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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 642

NATHAN R. UNDERWOOD and RICHARD M. MURRAY, JR., *Petitioners,*

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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INDEX

Citations to Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statute Involved 3

Statement 3

Reasons for Granting Writ 8

Conclusion 19

Appendix A—Opinions of the Courts Below 21

1. The Opinion by Judge Rives establishing the law of the case and holding that the cause was one for solution by jury (205 F. 2d 61) 21
2. The Opinion by District Judge Dawkins upholding the verdicts of the jury (Not reported but of record R. 367-368) 28
3. The Opinion by Judge Cameron voiding the verdicts of the jury (235 F. 2d 868) 30

Appendix B—Factual Conflicts Within Opinion Itself 51

Appendix C—Conflicting Opinion 60

Citations

CASES

Baltimore & Carolina Line v. *Redman*, (1935) 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636 8

Baltimore & Ohio R. R. Co. v. *Deneen*, 167 F. 2d 799 15

Brookhaven Lumber Co. v. *Illinois Central R. R. Co.*, 10 So. 66 18

Cahill v. *New York, New Haven & Hartford R. R. Co.*, ... U. S. ....., 100 L. Ed. (Advance Sheets p. 607) 17

Galloway v. *U. S.*, 319 U. S. 372, 87 L. Ed. 1458 (Dissenting opinion of Mr. Justice Black) 9

Harrison v. *Southern Ry. Co.*, 93 Miss. 40, 46 So. 408 15
Illinois Central R. R. Co. v. *Underwood and Murray*, (1956) 235 F. 2d 868 2
Lever Bros. Co. v. *Atlas Assurance Co.*, 317 F. 2d 770 15
Mangold v. *Bacon*, 237 Mo. 496, 141 S. W. 650 17-18
Northern Ry. Co. v. *Page*, (1927) 274 U. S. 65, 47 S. Ct. 491, 71 L. Ed. 929 8
Parsons v. *Bedford*, 3 Pet. 443, 7 L. Ed. 732 8
Slocum v. *N. Y. Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879 (1913) 8
Stoner v. *N. Y. Life Ins. Co.*, (1940) 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284 18
Thompson v. *Maxwell Land Grant & R. Co.*, 168 U. S. 451, 42 L. Ed. 539 17
Underwood & Murray v. *Illinois Central R. R. Co.*, (1953) 205 F. 2d 61 1-2

TEXTS

3 *Am. Jur.*, "Appeal and Error," Sec. 1000, p. 553 17
20 *Am. Jur.*, "Evidence," Sec. 1203, p. 1054 15
32 *C. J. S.*, "Evidence," Sec. 592, p. 443 15

CONSTITUTIONAL PROVISIONS AND RULES

Constitution of United States, Seventh Amendment 3
Federal Rules of Civil Procedure, Rule 50 (b) 3, 8
28 *U. S. C.*, Section 1254 (1) 2

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NATHAN R. UNDERWOOD and RICHARD M. MURRAY, JR., *Petitioners,*

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on August 3, 1956.

CITATIONS TO OPINIONS BELOW.

The original or first opinion of the United States States Court of Appeals for the Fifth Circuit which estab-

lished the law of this very case favorable to these Petitioners was entered on June 18, 1953, and is reported 205 F. 2d 61 printed in Appendix A hereto, *infra* page 21. The opinion of the District Court upholding verdicts for Petitioners based on jury verdicts was entered September 6, 1955, which opinion is unreported and is printed in Appendix A hereto, *infra* page 28. The last, or second, opinion of said Circuit Court of Appeals entered August 3, 1956, *infra* page 30, which nullified the judgments of the District Court (based on jury verdicts), is reported 235 F. 2d 868.

JURISDICTION

The judgment of the Court of Appeals here complained of was entered on August 3, 1956. The rehearing, which was duly applied for by Petitioners, was denied on October 4, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

1. Were not these Petitioners denied the right of trial by jury guaranteed to them by the Seventh Amendment to the Constitution of the United States?

2. Did not said Circuit Court of Appeals in its opinion of August 3, 1956, as shown on the face thereof, reexamine the facts tried by a jury otherwise than according to the rules of the common law and contrary to the provisions of said Seventh Amendment and the rights of Petitioners thereunder?

3. Did not the holding of said Circuit Court of Appeals for the Fifth Circuit that the *ex parte* and self-serving ex-

periment conducted by the Railroad Company in the daytime on November 10, 1953, destroyed and repelled the sworn evidence of the eye witnesses to the accident which occurred in the night time on April 11, 1950, conflict with the holdings of the Circuit Courts of Appeals for the Second Circuit, the Fourth Circuit and the Seventh Circuit, as well as the holding of the highest court of the State of Mississippi and the universal law, that the weight to be given to such an experiment is for the jury?

4. Has not said Circuit Court of Appeals in its second opinion, in light of the law of this very case as actually established by said Circuit Court of Appeals in its first opinion, departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision?

STATUTE INVOLVED.

There is here involved the Seventh Amendment to the Constitution of the United States, which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Also there is involved Rule 50 (b) of the Federal Rules of Civil Procedure.

STATEMENT.

The Petitioners were injured as a result of a collision with a train of the Respondent on a crossing at grade of

U. S. Highway 61. This accident occurred at night on April 11, 1950, before the installation by Respondent of any flash or gong signals. Separate complaints were filed by Petitioners on February 20, 1951, in the Circuit Court of Adams County, Mississippi. *Diversity of Citizenship existing,* the Respondent Railroad Company elected to remove these causes to the Federal District Court. The cases were there consolidated for trial. The first trial resulted in a directed verdict for the Respondent Railroad Company, with judgment against Petitioners being entered May 19, 1952. An appeal was duly prosecuted by Petitioners to the Circuit Court of Appeals for the Fifth Circuit, which Court on June 18, 1953, entered its opinion reversing the judgment of the District Court and holding:

> "Under the evidence in this case, *it was open to the jury* to find that the engineer saw and appreciated the peril of the appellants and the fact that they were unaware of the train in time to give warning by a blast or blasts of the whistle. Admittedly he failed so to do. *It was for the jury to say* whether such failure was negligence and whether it operated proximately to cause or contribute to the collision. See Zickefoose v. Thompson, 347 Mo. 579, 148 S. W. 2d 784; cf. Chesapeake & O. Ry. Co. v. Switzer, 275 Ky. 834, 122 S. W. 2d 967." (Italics ours).

No petition for rehearing nor petition for certiorari was filed by Respondent. Accordingly the law of this very case was fixed (Appendix A, *infra,* page 21, case reported 205 F. 2d 61). The mandate of the said Circuit Court of Appeals came down to the United States District Court for the Southern District of Mississippi. Based on that mandate, and on the faith thereof, the cause again came on for trial before said District Court in November, 1953. The jury was unable to agree and a mistrial was entered. Then in June, 1955, the cause was retried resulting in a judg-

ment in favor of Mr. Murray in the sum of $45,000 and in favor of Mr. Underwood in the sum of $5,000, though it was erroneously otherwise stated in the opinion of the Court of Appeals. On this last trial the same testimony (including the identical deposition of the Engineer Mobley), the identical plats and photographs were again introduced into evidence which were before said Circuit Court of Appeals at the time its first decision establishing the law of this case was rendered. Additionally, testimony of members of the train crew, when viewed favorable to Petitioners, as the jury was entitled to do, amplified upon the Respondent's liability. In overruling Motions for Judgment Notwithstanding the Verdict and for a New Trial, the learned District Judge, based on the evidence of record, observed:

> "There was credible evidence from which the jury reasonably could have concluded, or inferred, and evidently did, that the engineer saw and appreciated plaintiffs' peril and yet failed to give them warning by blasts of his whistle, which could have prevented the accident. Accordingly, a jury question, pure and simple, was presented. The jury has spoken, not unreasonably, and we cannot find justification to disturb its verdicts, or its awards, which were not excessive." (R. 367-368).

An appeal, with supersedeas, was then prosecuted by Respondent. Said Circuit Court of Appeals on this second appeal (with different judges sitting) re-evaluated the evidence and determined to reverse the judgments of the District Court which were based on jury verdicts and to enter a final judgment in favor of the Respondent Railroad Company, all as shown by opinion of said Court of Appeals entered August 3, 1956, *infra*, page 30, reported 235 F. 2d 868. This judgment was rendered against Petitioners and in favor of Respondent based upon said appel-

late court factually concluding[1] that a self-serving and *ex parte* experiment conducted by the Respondent Railroad Company in the daytime on November 10, 1953, in the words of said Circuit Court of Appeals, "met and repelled" the other affirmative and sworn testimony of record, with that Court holding that this experiment "destroyed",[1a] the probative force of the sworn testimony of the eye witnesses as to what took place when the accident occurred in the night time on April 11, 1950. This experiment was predicated on certain testimony of the Railroad Company's own train crew with a view of impeaching or altering other sworn testimony of the same witnesses. The Court of Appeals in its opinion concluded:

> "The crucial question in the case throughout has been, where exactly was the Murray car when the engineer first saw it? This question was answered[2] by exact measurements made *in the experiment which duplicated precisely the situation at the time of the accident.*" (emphasis supplied by us).

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[1]The Court of Appeals itself stated: "The Court below tracked our former opinion meticulously and no errors are assigned in connection with its charge."

[1a]See footnote 26 to said opinion.

[2]The question was better "answered" by the sworn testimony of the members of the train crew who were on the engine at the time the accident occurred. For example, Brakeman Gibson was at the left window of the cab of the engine, a position which was not included in or encompassed by the so-called test or experiment which was conducted by the Railroad Company three and one-half years later. This witness, Brakeman Gibson, swore he saw the car when it was at the Airport Road (a distance of 900 feet north of the crossing) and this witness said that the engineer saw the car in the same point of time and estimated that the car was at least 400 feet north of the train when, in answer to the question put to him by Engineer Mobley, he told the engineer that the car was not going to stop (R. 289, 297, 299-300 and 304).

The jury, under instructions which were admittedly proper and in accordance with the established law of this case, had found the facts favorable to Petitioners. The Court of Appeals opined, as above shown, that the experiment which was admittedly made in the daytime three and one-half years after the accident "duplicated precisely the situation at the time of the accident." This amounted to a judicial holding that there is *in fact* no difference between daytime and night time, between light and darkness, for the accident occurred when, according to all of the evidence, it was "plumb dark" (R. 312), the Court of Appeals itself reciting that "the night was *dark* but clear." Overthrowing the jury's findings and declaring that the sworn testimony of the witnesses had no probative worth, the Court of Appeals elected to conclude that an experiment conducted by an interested witness (the very experiment itself being dependent upon the credibility of the witnesses as to both the basis and the result thereof) superseded the sworn testimony of eye witnesses and precluded the jury, as the trier of the facts, from finding otherwise.

In their Petition to Rehear Petitioners demonstrated from the record that the facts of record had been re-examined by the appellate court otherwise than according to the rules of the common law, and they expressly alleged that their constitutional rights assured by the Seventh Amendment had been violated.[3]

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[3]Petitioners likewise presented and argued in the brief appended to their Petition to Rehear that they were being deprived of a trial by jury in that the Court of Appeals was substituting its conclusion as to the facts for those found by the jury from credible evidence of record.

REASONS FOR GRANTING WRIT.

1ST: The right of trial by jury is one of the bulwarks of the liberties we enjoy. This right was guaranteed to these Petitioners, young men who are citizens of Texas and Louisiana, as well as to all who have any controversy cognizable at common law tried in the courts of the United States. Admitted inroads over the years have by this Court been made or sanctioned with reference to the right of trial by jury. In 1830, when deciding the case of *Parsons* v. *Bedford*, 3 Pet. 443, 7 L. Ed. 732, this Court held that an appellate court of the United States could only reverse a case and remand it for a new trial. Then in *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, decided in 1913, the Court again exhaustively reviewed the question, adhering to its former conclusion. Later, under the pressure of the trend in state practice and the desire of the bench and bar to avoid needless and repetitious trials, this Court opened the door for judgments notwithstanding the verdict, consequently giving appellate courts the power to reverse the jury's verdict without granting a new trial. See the cases of *Northern Ry. Co.* v. *Page*, (1927), 274 U. S. 65, 47 S. Ct. 491, 71 L. Ed. 929, and *Baltimore & Carolina Line* v. *Redman*, (1935), 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636. These two decisions were followed by Rule 50 (b) of the Federal Rules of Civil Procedure. Since the decision rendered in the latter two cases and the adoption of said Rule 50 (b), this Court has not placed any direct curb on the vast new powers thereby granted to the Courts of Appeals of the United States by spelling out any limitations thereon based on the Seventh Amendment.[4] Right of trial by jury will be meaningless

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[4]The attorneys for Petitioners have read every decision of this Court (since the decision in the *Slocum* case, *supra*) listed in the

and puerile if the judges of the Courts of Appeal are privileged to re-evaluate the evidence of record and to substitute their findings as to the facts for those justifiably made by the jury.

The instant case transcends the interest of the parties immediately concerned. The fact that the Court of Appeals has weighed the evidence and reached a conclusion opposed to that of the jury and substituted its opinion for that of the jury is painfully obvious on the face of the opinion entered August 3, 1956. Remember that in its first opinion the Circuit Court of Appeals established the law of this very case. In that opinion the Court detailed the evidentiary basis for the submission of Petitioners' case to the jury declaring that under that evidence "it was open to the jury to find" if the Respondent was negligent, and "it was for the jury to say" whether such negligence proximately caused the collision and the grievous injuries to Petitioners.

The case was retried in strict conformity with the mandate of the Appellate Court. In the second opinion the Court of Appeals observed: "The court below tracked our former opinion meticulously and no errors are assigned in connection with its charge." The jury, on admittedly proper instructions, found for these Petitioners. The Respondent exercised its right to appeal. The Appellate Court, even though different judges were sitting, made no pretense of changing the law of the case as announced in the first opinion. Further, the Court admitted in its second opinion that the very evidence, the same deposition of

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table of cases citing or construing the Seventh Amendment in the digest to the Lawyers Edition of the Supreme Court Reports and the only application of the Seventh Amendment to cases of this category is found in the dissenting opinion of Justice Black in the case of *Galloway* v. *United States*, 319 U. S. 372, 87 L. Ed. 1458.

the engineer, was again presented for the jury's consideration.[5] However, the Court went on to hold that evidence of an *ex-parte* experiment made *post litem motam* by the Respondent Railroad rendered nugatory the sworn testimony of the eye witnesses to the accident. This was concluded as a factual proposition for it is a matter of universal law, as we shall hereinafter demonstrate, that the weight, if any, to be given to such test or experiment is for the jury.

This is a clear-cut case (shown on the face of the opinion) where an appellate court has re-examined the facts tried by a jury otherwise than according to the rules of the common law and in contravention of the express provisions of the Seventh Amendment. This Court is therefore here presented with a patent violation of the Constitution of the United States by a Court of the United States. Since this Court has not heretofore dealt with the question of the limitations imposed upon the Courts of Appeal of the United States by the Seventh Amendment in the exercise of the powers granted to these Courts of Appeals under Rule 50 (b) of the Federal Rules of Civil Procedure, this Court should now seize upon the opportunity to set the record straight and for the first time announce its position on a question of such fundamental import to the jurisprudence of this nation and, even more important, to the personal rights and liberties of the citizens of these United States.

2nd: On the face of the opinion of the Circuit Court of Appeals entered August 3, 1956, *infra*, page 30, it def-

[5]See footnote No. 2 to said opinion of said Circuit Court of Appeals. Incidentally this deposition was admitted without objection (R. 131) and upon a stipulation that it could be introduced "in evidence at the trial of the case by either party." (R. 132). Further, Engineer Mobley, when introduced as a witness by the Railroad Company, did not give testimony which even varied with his sworn utterances when a deponent, though, if he had, the conflict would have been for the jury to solve.

initely appears that there are facts of record which uphold the conclusion reached by the jury but which are at variance with the factual conclusions of the Appellate Court. Based on the deposition of Engineer Mobley (a deposition which was admitted in evidence without objection and by stipulation and in the record before the Court of Appeals on both appeals) the Court of Appeals in an able opinion authored by Judge Rives in establishing the law of the case stated:

> "The engineer testified that he had gained a speed of about fifteen miles per hour and that after he applied the emergency brakes it took approximately seventy-five feet within which to bring the train to a stop. At another place in his testimony, he said that the train went three and one-half or four car lengths (or as much as 175 to 200 feet) before it stopped. If we assume that at the time the emergency brakes were applied the train was traveling fifteen miles per hour, and that the approaching automobile was traveling sixty miles per hour, and that the train was actually stopped at the time of the collision, as the evidence tended to show, then, *the automobile would have been somewhere between 300 feet and 800 feet north of the crossing when the engineer applied the brakes.*" (Italics supplied).

It was the italicized portion only of the above *quoted* excerpt from the opinion of Judge Rives which, lifted out of context, the Court of Appeals in its second opinion by Judge Cameron has declared was "met and repelled" by the other evidence, to-wit: the so-called experiment. It was and remains the law of this case that if the engineer recognized the peril in which these Petitioners were in when their car was "somewhere between 300 feet and 800 feet north of the crossing" and then failed to warn Petitioners by a blast or blasts of the whistle it was for the jury to say whether this was negligence under the last

clear chance doctrine and whether or not this negligence proximately caused or contributed to the collision. The Appellate Court, through Judge Cameron's opinion on the second appeal, has now factually held (attributable to the Railroad's version of an experiment which it conducted three and one-half years after the accident) that the jury was not justified in concluding that the Petitioners' car was as much as 300 feet north of the crossing occupied by the train when the engineer recognized their peril. This factual conclusion not only disregarded the sworn testimony of the witnesses but is even at variance with the Appellate Court's own findings regarding the experiment. On the last feature, the Appellate Court, speaking through Judge Cameron, says with reference to this experiment:

> "The engine was stopped when it was three car lengths from the center of the crossing, and Civil Engineer McCullough walked up the highway until Locomotive Engineer Mobley motioned him to stop. McCullough was then 200 feet from the point of collision. The engine was thereupon stopped when it was six car lengths from the crossing, and McCullough walked up the highway until Mobley stopped him, and that point was 392 feet from the point of impact. By the same means it was determined that, when the engine was eight car lengths from the crossing, McCullough was visible 503 feet from the point of impact, and when the engine was nine car lengths away McCullough was visible 558 feet from the point.
>
> This experiment proved that Engineer Mobley, focusing his eyes and centering his attention exclusively on McCullough could see him in the day time as he stood on the road at the points mentioned. This removed from the realm of speculation all doubt as to when Mobley *could possibly have seen the car the night of the accident*, assuming that his attention was centered upon it at the first fraction of a second it became visible."

Even if the Appellate Court was privileged to treat the experiment as gospel, it is clear therefrom that Engineer Mobley could have seen the car (and he swore he did see it) when it was 392 feet or more north of the crossing. The opinion by Judge Rives in establishing the law of this case merely pointed out that the car was 300 feet or more north of the crossing at the time the engineer applied his brakes but neglected to blow the whistle. Therefore, even based upon the Court of Appeals' favorable version of this so-called test, it did not meet and repel the "assumption" above quoted from Judge Rives' opinion, which still stands as the law of this case.

The other "assumption" which the Appellate Court in Judge Cameron's opinion now states was "met and repelled" appears from the following italicized portion only of the first and still standing opinion of said Circuit Court of Appeals, viz.:

> "* * * The engineer was familiar with the crossing, and knew of the curve around which the automobile must travel before its lights would shine on the train. The thirty-four degree angle between the railroad and the highway, together with their nearly parallel location, beyond the curve were such that *the engineer north of the crossing may have had a clear view of highway traffic moving south, while the train and the lights on the engine may not have been obvious to the operator of the motor vehicle.*"

Clearly the italicized portion was proven in the record on the second appeal just as it was in the record on the former appeal. The above quoted reference of the Court in its first opinion was to the angle of the crossing. The lights of the train, northeasterly up the track, would not likely be seen at night by one, north of the crossing, traveling southwesterly on U. S. Highway 61 whose attention was on the highway; yet those on the train would (as the

record shows they did) naturally see the lights of the approaching car. This second "assumption" was proven on both the first and second trials not only by what happened (the sworn testimony of the witnesses) but by the plat itself. The *same* plat was introduced on the first trial (Pltfs. Ex. 10, p. 40 of Record in Case No. 14,304) and again by consent and stipulation on the second trial, both sides agreeing "that this sketch, or map, truly represents the layout of the highway and the railroad track at the scene of the accident." (R. 42). This same exhibit was in each appeal sent up to the Appellate Court in original form.

There are several other occasions where on the very face of the opinion by Judge Cameron it is apparent that the Appellate Court has re-examined the facts otherwise than according to the common law. These instances are pointed out in Appendix B hereto entitled "Factual Conflicts within Opinion Itself," *infra*, page 51.

3rd: The opinion of the Appellate Court on the second appeal judicially proclaimed that the experiment furnished important additional evidence; that the experiment factually solved the "crucial question" in the case and that the experiment "removed from the realm of speculation all doubt as to when Mobley *could possibly have seen the car the night of the accident*, assuming that his attention was centered upon it at the first fraction of a second it became visible." Then the Appellate Court in footnote 26 concludes:

> "The undisputed and credible evidence given at this trial and the measurements newly furnished by the experiment *destroy* the assumptions of fact—quoted at the beginning of this opinion—upon which we based the conclusions announced in our decision following the first trial. Those assumptions were *predicated* largely *on testimony*, then undisputed and

> unquestioned, concerning estimates of how far the train probably ran after the brakes were applied. On this trial it appeared that those were mere guesses, based upon the average time normally consumed in such a step. The measurements and the amplified testimony here demonstrated that those estimates had no probative worth."

Such a holding that an *ex parte* and self-serving experiment as a matter of law could (much less did) peremptorily *destroy* and supplant the sworn testimony of the eye witnesses to the occurrence conflicts with the law as announced by the highest Court of the State of Mississippi in the analogous case of *Harrison* v. *Southern Ry. Co.*, 93 Miss. 40, 46 So. 408, where, speaking through Justice Whitfield, it was stated that such an experiment "was competent to go to the jury for whatever they might think it worth" and further stated:

> "The question for solution in this case is whether the engineer did see, or under the circumstances ought to have seen, the child in time to have avoided the injury, and this testimony was valuable in the solution of that question. The case was one which, on its facts, *ought to have been solved by the jury.*"

The holding here by the Fifth Circuit Court of Appeals that an *ex parte* experiment conducted by an interested litigant must, as a matter of law, control over the sworn testimony of the actual witnesses clearly conflicts with the holding of the Fourth Circuit Court of Appeals in the case of *Baltimore & Ohio R. Co.* v. *Deneen*, 167 F. 2d 799, and is at variance with the holding of the Seventh Circuit Court of Appeals in the case of *Lever Bros. Co.* v. *Atlas Assurance Co.*, 131 F. 2d 770. This holding is contrary to the fundamental and general law, 32 C. J. S., verbo "Evidence," Section 592, page 443, and 20 Am. Jur., verbo "Evidence," Section 1203, page 1054. For excerpts from said decisions and

the universal law on the subject see Appendix C, "Conflicting Opinion," *infra*, page 60.

4th: Undue and unusual hardship will result to Petitioners if certiorari be not granted. For six years now, at great expense and personal sacrifice, these Petitioners have been seeking to have their grievances justly settled through trial by a jury of their peers. Reliance was naturally placed by Petitioners and the District Court on the first opinion of the Court of Appeals entered on June 18, 1953, as authored by Judge Rives. That opinion established the law of this case and that the issue of negligence, under the last clear chance doctrine, was one for solution by jury.[6] Two costly jury trials followed, the first being a mistrial. Now not only is Mr. Murray by the last opinion of the Appellate Court deprived of his jury award of $45,000 but he stands mulcted in high cost—the costs of the last two trials plus the costs (tremendous to him) of the second appeal which stand assessed against him. This young man, horribly injured and paralyzed though he is, has, through his grit and determination, earned an interest in a carpet-laying business, and is thereby supporting his family and himself. Believing in and relying on the courts of this land—the law as first announced in his own case—has, under the last opinion of the Appellate Court, cast Mr. Murray for an onerous liability—one which can cost him the assets he has accumulated in his business. Much more cause for concern and real hardship is here threat-

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[6]It should not therefore lie or be within the power of the Respondent to change the law of this case. Surely it is not the law that a Defendant who does not wish to be held responsible in damages may, by an *ex parte* experiment, not only contradict its own witnesses but absolutely exonerate and shield itself from liability. This would permit such a litigant to be his own judge and jury.

ened and will result, if certiorari be not granted, than could have been the result in the recent and muchly publicized case of *Cahill* v. *New York, New Haven & Hartford R. R. Co.*, ... U. S. ....., 100 L. Ed. (Advance Steets p. 607), decided May 14, 1956, with dissenting opinion by Mr. Justice Black, with whom The Chief Justice, Mr. Justice Douglas, and Mr. Justice Clark joined.

5th: Under Rule 19 (b) of this Court it is proclaimed that certiorari may be granted when a court of appeals "has so far departed from the accepted and usual course of judicial proceeding * * * as to call for an exercise of this court's power of supervision." As stated in *Thompson* v. *Maxwell Land Grant & R. Co.*, 168 U. S. 451, 42 L. Ed. 539: "It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. *Wayne County Supervisors* v. *Kennicott*, 94 U. S. 498 (24:260), and cases cited in the opinion: *Clark* v. *Keith*, 106 U. S. 464 (27:302); *Chaffin* v. *Taylor*, 116 U. S. 567 (29:727); *Northern P. Railroad Company* v. *Ellis*, 144 U. S. 458 (36:504); *Great Western Telegraph Company* v. *Burnham*, 162 U. S. 339, 343 (40:991, 993)."

This rule logically applies to questions of the sufficiency of the evidence to present an issue for jury determination. 3 *Am. Jur.*, "Appeal and Error," Section 1000, page 553. Assuredly, the litigants and the District Court were under the duty to accept, rely upon and to be guided by the law of this case as established in Judge Rives' opinion herein. It is contrary to the accepted and usual course of judicial proceedings to permit in the same case a change in the law governing, for, as aptly stated in *Mangold* v.

Bacon, 237 Mo. 496, 141 S. W. 650: *"It would be intolerable if parties litigant were allowed to speculate on changes in the personnel of a court, or on the chance of our rewriting propositions once gravely ruled on solemn argument, and handed down as the law of a given case."*

Upon reading the opinion on the second appeal it is, we submit, apparent that different judges determined that a different result should be reached. Such a conclusion, in light of the established law of this very case, is such a departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision. The standing opinion, by analogy and in fact, is directly contra to the holding of this Court in *Stoner* v. *N. Y. Life Insurance Co.*, (1940) 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284.

There is no time table or "six second" rule as a part of the common law of Mississippi, and the case relied upon in the present opinion (*Brookhaven Lumber Co.* v. *Illinois Central R. R. Co.*) as so showing was decided in 1890, the horse and buggy days, by a *jury verdict* for the railroad company. For a full explanation, and showing the reason why the *Burge* case and other such authorities now cited were rejected at the time the law of this case was established (and should still stand rejected), see Ground 7th of Petition to Rehear and particularly pages 45 to 54 of the Brief appended to, and as a part of, said Petition.

CONCLUSION.

For the foregoing reasons and to enable the accomplishment of justice under law this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A.

Opinions of the Courts Below.

1. The Opinion by Judge Rives establishing the law of the case and holding that the cause was one for solution by jury:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 14304.

[Now Reported 205 F. 2d 61.]

NATHAN R. UNDERWOOD and RICHARD M. MURRAY, JR.,
Appellants,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

(June 18, 1953.)

Before Holmes, Strum and Rives, Circuit Judges.

Rives, Circuit Judge: The railroad crossing accident in which the appellants were injured occurred at about

8:30 o'clock on the night of April 11, 1950, at what is known as the Selma crossing on U. S. Highway 61, about eight miles north of the city of Natchez, Mississippi. Just prior to the collision, the automobile driven by Murray, and in which Underwood was a passenger, was traveling in a southerly direction and the train had been traveling in a northerly direction. The extent of the traffic on the part of the railroad between Natchez and Harriston, a town about twenty-eight miles further north, was one freight train each twenty-four hours from Natchez to Harriston and return, with no passenger trains running on that part of the railroad. Both the highway and the railroad ran in a northerly and southerly direction. North of the crossing, the highway was on the west side of and almost parallel to the railroad until it got close to the crossing, when it made a left curve, went across the railroad, then a right curve and continued to go south. The highway was practically straight for a distance of 225 feet just north of the crossing, though the investigating officer testified that in his opinion a car coming around the curve would be only about 150 feet away from a train occupying the crossing when the automobile lights first shone on the train. At a point on the west side of the highway fifty-six feet north of the crossing was a sign reading "stop, Mississippi Law," and at a point seven hundred and twenty feet north of the crossing was another sign reading "Railroad Crossing." At the point of the crossing there was a thirty-four degree angle between the railroad and the highway.

There is a side track on the east side of the main line of the railroad just south of the crossing, at such distance that the part of the main line between the highway and the switch will hold a locomotive and a railroad car. As the train proceeded northerly, the engineer brought it to

a stop before reaching the crossing, uncoupled the engine, backed into the siding, and picked up a box car loaded with pulpwood. He then pulled out on the main line, backed in to recouple with his train, and had proceeded on northerly to a point where the collision occurred. The automobile ran into the eighth car of the sixteen car freight train.

There was no dispute as to the facts thus far stated. Under the evidence, the jury would have been authorized to find the following additional facts. The automobile, a new 1950 model Buick, was in perfect condition, including its brakes, steering gear and lights. Murray was a good and careful driver. Murray had been on this particular section of the highway on one other occasion, and Underwood had never before traveled this part of the highway. The automobile had been traveling at a speed of approximately fifty-five to sixty miles per hour with bright or driving lights on. Murray and Underwood each testified that he was awake and watching but denied seeing either of the warning signs. They both saw the train for the first time when the lights of their automobile shone on the railroad car, but Murray's efforts then to avert the collision were unavailing.

To overcome the evidence of their negligence in failing to observe either of the warning signs and in driving into the side of the train, the appellants invoked the humanitarian "last clear chance" doctrine, and relied particularly upon the following testimony of the locomotive engineer:

> "Q. What was the first—Did you ever see the Murray car yourself, Mr. Mobley?
>
> "A. Yes, sir. I saw the headlights. That was all.
>
> "Q. How far was it from the crossing when you saw the headlights?

"A. Well, I would say it was 300 feet, 400 maybe right in that neighborhood.

"Q. Somewhere around three or four hundred feet?

"A. Yes, sir.

"Q. What rate of speed was the car going at that time?

"A. It looked like he was going at a fast rate of speed, judging from the lights coming down the road.

"Q. You think he was going pretty fast?

"A. Yes, sir.

"Q. Well, did either the fireman or brakeman say anything to you about the car?

"A. No, sir. I called their attention.

"Q. What did you say?

"A. I asked them whether that car was going to get to a stop.

"Q. What did they say?

"A. The brakeman turned around to judge it, to see whether it was going to get to stop or not.

"Q. And did he say anything to you about whether or not it was going to get to stop?

"A. He said, 'No.'

"Q. And the fireman had stopped firing then? He fired back up there when you were pumping—

"A. He was firing when I asked whether the car was going to get stopped or not.

"Q. Did you see the car, using the brakeman's window? Is that the window you saw it out of?

"A. The left cab window, yes, sir.

"Q. In other words, it was almost to your left when you first saw it?

"A. Yes, sir.

"Q. What did you do then, Mr. Mobley?

"A. Applied the brakes for emergency when he said 'No.'"

The engineer testified that he had gained a speed of about fifteen miles per hour and that after he applied the emergency brakes it took approximately seventy-five feet within which to bring the train to a stop. At another place in his testimony, he said that the train went three and one-half or four car lengths (or as much as 175 to 200 feet) before it stopped. If we assume that at the time the emergency brakes were applied the train was traveling fifteen miles per hour, and that the approaching automobile was traveling sixty miles per hour, and that the train was actually stopped at the time of the collision, as the evidence tended to show, then, the automobile would have been somewhere between 300 feet and 800 feet north of the crossing when the engineer applied the brakes. The engineer testified that he had given the regular whistle and bell signals before reaching the crossing, but did not blow the whistle after he passed the crossing, and would not say whether the bell was still automatically ringing or not. The engineer was familiar with the crossing, and knew of the curve around which the automobile must travel before its lights would shine on the train. The thirty-four degree angle between the railroad and the highway, together with their nearly parallel location beyond the curve were such that the engineer north of the crossing may have had a clear view of highway traffic moving south, while the train and the lights on the engine may not have been obvious to the operator of the motor vehicle.

At the conclusion of the plaintiff's evidence, the District Judge directed a verdict for the defendant relying particularly upon three cases decided by the Supreme Court of Mississippi, *Gulf M. & N. R. Co.* v. *Holifield,* 152 Miss. 674, 120 So. 750; *Spilman* v. *Gulf & S. I. R. Co.,* 173 Miss. 725, 163 So. 445; and *Boyd* v. *Illinois Cent. R. Co.,* 211

Miss. 409, 52 So. 2d 21. In effect these cases held that the occupancy of a crossing by a railroad train was a sufficient warning within itself. They recognized, however, the following qualification, as expressed in the latest of the three cases, *Boyd* v. *Illinois Cent. R. Co., supra,* at page 23:

> "unless the conditions and circumstances are such that the employees know, or in the exercise of reasonable care and caution should know, that a person driving upon the highway at a reasonable rate of speed in an automobile properly equipped with lights, and carefully operated, could not see or might not be able to see the cars in time to avoid a collision therewith."

Neither of these cases involved the application of the last clear chance doctrine, which is firmly imbedded in the jurisprudence of Mississippi. *Vicksburg & Jackson Railroad Co.* v. *Patton,* 31 Miss. 156; *Mississippi Cent. R. Co.* v. *Mason,* 51 Miss. 234; *Fuller* v. *Illinois Cent. R. Co.,* 100 Miss. 705, 56 So. 783; *Gulf M. & N. R. Co.* v. *Arrington,* 107 So. 378; *Mississippi Cent. R. Co.* v. *Aultman,* 160 So. 737. In the last cited case the Mississippi Supreme Court said: "When the engineer saw and appreciated the peril, it was his duty to use every reasonable means to prevent the collision." Other Mississippi cases have recognized that it was for the jury to say whether the failure to give warning by a blast of the train whistle was the proximate cause of an accident. *Johnson* v. *Columbus & G. Ry. Co.,* 7 So. 2d 517; *Young* v. *Columbus & G. Ry. Co.,* 147 So. 342.

Under the evidence in this case, it was open to the jury to find that the engineer saw and appreciated the peril of the appellants and the fact that they were unaware of the train in time to give warning by a blast or blasts of the whistle. Admittedly he failed so to do. It was for the jury to say whether such failure was negli-

gence and whether it operated proximately to cause or contribute to the collision. See *Zickefoose* v. *Thompson*, 347 Mo. 579, 148 S. W. 2d 784; cf. *Chesapeake & O. Ry. Co.* v. *Switzer*, 275 Ky. 834, 122 S. W. 2d 967.

It follows that the court erred in directing a verdict for the defendant and the judgment is

Reversed.

Holmes, Circuit Judge: I dissent.

2. The Opinion by District Judge Dawkins upholding the verdicts of the jury:

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, WESTERN DIVISION, AT VICKSBURG.

CIVIL ACTION.

No. 499.

NATHAN R. UNDERWOOD,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY.

CIVIL ACTION.

No. 500.

RICHARD M. MURRAY,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY.

(Consolidated Cases.)

Dawkins, Jr., District Judge:

Ruling on Pending Motions.

We have considered carefully the respective briefs, and authorities cited, reaching the following conclusions:

The law of these cases, especially as it pertains to applicability *vel non* of the "last clear chance" doctrine, was established by the decision of the Fifth Circuit Court of Appeals, which reversed the peremptory instruction and remanded for a new trial. If that law is to be changed, it must be done by the appellate Court, not by us.

There was credible evidence from which the jury reasonably could have concluded, or inferred, and evidently did, that the engineer saw and appreciated plaintiff's peril and yet failed to give them warning by blasts of his whistle, which could have prevented the accident. Accordingly, a jury question, pure and simple, was presented. The jury has spoken, not unreasonably, and we cannot find justification to disturb its verdicts, or its awards, which were not excessive.

For these reasons, the motions for judgment n. o. v., and the alternative motions for a new trial, in each case must be Denied.

Thus Done and Signed, in Chambers, at Shreveport, Louisiana, this 6th day of September, 1955.

Ben C. Dawkins, Jr.
United States District Judge.

(R. pp. 367-368.)

3. The Opinion by Judge Cameron voiding the verdicts of the jury:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 15913.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

NATHAN R. UNDERWOOD and RICHARD M. MURRAY, JR., Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

(August 3, 1956.)

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

(August 3, 1956.)

CAMERON, Circuit Judge: This appeal calls on us to decide whether evidence offered in the present trial was sufficiently different from that before us when we reversed the case on the prior trial, to bring about a different result. An automobile driven by appellee Murray, in which appellee Underwood was a passenger ran into the side of a freight train, and both appellees sustained serious injuries. The two actions brought against the Illinois Central Railroad Company, appellant, were consolidated and resulted in a directed verdict in favor of

the Railroad on the first trial. We reversed,[1] holding that, "Under the evidence in this case," the jury might find in favor of the two injured men on the doctrine of Last Clear Chance.

In stating the facts before the Court in the former appeal we used in part the following language:

> "The railroad crossing accident in which the appellants were injured occurred at about 8:30 o'clock on the night of April 11, 1950, at what is known as the Selma crossing on United States Highway 61, about eight miles north of the City of Natchez, Mississippi. Just prior to the collision, the automobile driven by Murray, and in which Underwood was a passenger, was traveling in a southerly direction and the train had been traveling in a northerly direction. The extent of the traffic on the part of the railroad between Natchez and Harriston, a town about twenty-eight miles further north, was one freight train each twenty-four hours from Natchez to Harriston and return, with no passenger trains running on that part of the railroad. Both the highway and the railroad ran in a northerly and southerly direction. North of the crossing, the highway was on the west side of and almost parallel to the railroad until it got close to the crossing, when it made a left curve, went across the railroad, then a right curve and continued to go south. The highway was practically straight for a distance of 225 feet just north of the crossing, though the investigating officer testified that in his opinion a car coming around the curve would be only about 150 feet away from a train occupying the crossing when the automobile lights first shone on the train. At a point on the west side of the highway fifty-six feet north of the crossing was a sign reading 'Stop, Mississippi Law', and at a point seven hundred twenty

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[1] *Underwood et al. v. Illinois Central Railroad Co.*, 1953, 205 F. 2d 61.

feet north of the crossing was another sign reading 'Railroad Crossing'. At the point of the crossing there was a thirty-four degree angle between the railroad and the highway.

"There is a side track on the east side of the main line of the railroad just south of the crossing, at such distance that the part of the main line between the highway and the switch will hold a locomotive and a railroad car. As the train proceeded northerly, the engineer brought it to a stop before reaching the crossing, uncoupled the engine, backed into the siding, and picked up a box car loaded with pulpwood. He then pulled out on the main line, backed in to recouple with his train, and had proceeded on northerly to a point where the collision occurred. The automobile ran into the eighth car of the sixteen-car freight train.

"There was no dispute as to the facts thus far. Under the evidence, the jury would have been authorized to find the following additional facts. The automobile, a new 1950 model Buick was in perfect condition, including its brakes, steering gear and lights. Murray was a good and careful driver. Murray had been on this particular section of the highway on one other occasion and Underwood had never before traveled this part of the highway. The automobile had been traveling at a speed approximately fifty-five to sixty miles per hour with bright or driving lights on. Murray and Underwood each testified that he was awake and watching but denied seeing either of the warning signs. They both saw the train for the first time when the lights of their automobile shone on the railroad car, but Murray's efforts then to avert the collision were unavailing."

The former opinion then proceeded with an extended quotation from the engineer's testimony, but we end the quotation at this point for the reason that the testimony quoted in the former opinion was taken from an explor-

atory deposition taken by appellees some months before the first trial, while this time the engineer testified in person,[2] being examined by the railroad's attorneys for the first time. Based exclusively upon the deposition testimony of the engineer including his estimate as to how far his train ran after application of the brakes in emergency, we concluded before that "the automobile would have been somewhere between 300 feet and *800 feet* north of the crossing when the engineer applied the brakes." We further concluded that, "the engineer north of the crossing *may have had a clear view of highway traffic moving south*, while the train and the lights on the engine may not have been obvious to the operator of the motor vehicle". (Emphasis supplied in each instance.)

Based upon the testimony at the former trial and the quoted assumptions we found then to be sustained by it, we concluded that the Court below had committed error in directing a verdict in favor of the railroad company at the end of appellee's testimony, citing the rule of law recognized by the Supreme Court of Mississippi:

> "When the engineer saw and appreciated the peril, it was his duty to use every reasonable means to prevent the collision."

In the former opinion we recognized that the Supreme Court of Mississippi had, in a long line of decisions, recognized the rule that the presence of a train of cars making legitimate use of a crossing is, of itself, sufficient warning to approaching motorists. We pointed out, however,

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[2] In addition to the deposition which was again used by appellees.

that, in the case of *Boyd* v. *Illinois Central Railroad Co.*, 52 So. 2d 21, the Mississippi Court had recognized that exceptional circumstances might exist at the crossing which would warrant the non-application of the rule. The exceptional circumstances there existing were that the railroad had not, as required by law,[4] provided the Mississippi Stop Sign, that there was a dip in the road a short distance away from the intersection and a downgrade just before reaching the main track, deflecting downward the lights of approaching automobiles; that the railroad had stopped a flatcar straddle the crossing, which presented to the oncoming motorist a view only of the side of a sill about fifteen or eighteen inches across; and that Boyd, realizing that he was approaching the vicinity of the railroad track, was looking for the stop sign to indicate when he was actually approaching the point of intersection and was lured into the danger by its absence. Our conclusion based upon that case and certain cases dealing with the doctrine of Last Clear Chance, was "Under the evidence in this case, it was open to the jury to find that the engineer saw and appreciated the peril of the appellants and the fact that they were unaware of the train in time to give warning by a blast or blasts of the whistle * * *."

Upon a second trial of the consolidated cases the jury was unable to reach a verdict, and upon a third trial the jury found in favor of appellee Murray in the sum of $5,000 and of appellee Underwood in the sum of $45,000. The Court below tracked our former opinion meticulously

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Summerford v. *Illinois Cent. R. Co.*, 196 So. 264; *Gulf, M. & N. R. Co.* v. *Kennard*, 164 Miss. 380, 145 So. 110; *Mississippi Export R. Co.* v. *Summers*, 194 Miss. 179, 11 So. 2d 429. And cf. *Pollard* v. *Davis*, 5 Cir., 1938, 93 F. 2d 193.

[4]§7775, Code of 1942.

and no errors are assigned in connection with its charge. But we think that the Court below erred in denying the railroad's motion for a directed verdict at the end of all of the evidence for the reason that the evidence in this case met and repelled the assumptions quoted above upon which the case was decided on the former appeal.

In this case the testimony of appellees was somewhat different from what it had been in the first trial, all of the members of the train crew testified, both on direct and cross-examination, showing full performance of the duties laid upon them by law; the engineer amplified the testimony he had given on *ex parte* examination by appellees' attorney; and, in addition, evidence was admitted without objection of experiments conducted by engineer Mobley and others which demonstrated that it was physically impossible for him to see appellees' car at a sufficient distance from the point of collision to warrant the finding that it was reasonably probable that the engineer could have done anything to prevent the accident. This experimentation and the measurements developed by it furnished by far the most important additional evidence and will be discussed fully below.

The evidence here shows without dispute that the concrete highway upon which appellees approached the point of collision was substantially level (1.13 percent grade); that the curve to the left was very slight (1° 30′) and reached a straightaway 222 feet from the railroad track; that appellees faced a reflective type crossing sign, two and one-half feet in diameter with the top five feet from the ground, 675 feet from the crossing and the regular Mississippi Stop Sign 56 feet from the crossing, both of which signs were, by the slight curve, thrown directly into the rays of the car headlights. It was further undisputed that a series of moving railroad cars were passing

along in front of appellees which these sketches show would have been clearly visible to one looking even before the straightaway was reached; that the car had perfect headlights, and the night was dark but clear.

On the first trial both appellees indicated that they had not seen the train until they were "right on it", and they were inclined at the outset to repeat pretty much the same thing on this trial. But Murray, the driver, stated on cross-examination that, in his best judgment, he saw the train "whenever them lights picked it up—whatever length of the lights was." Thereupon the Court took up the examination with this result: "The Court: The average city block is about three hundred feet. Can you give us in terms of a city block how far you were; a third of a block or a half a block? The Witness: About a half block. The Court: About a half a block? The Witness: Something like that." Following that, he was asked by the railroad attorney if he meant about one hundred fifty feet, and he answered, "Something like that, yes, sir." Both appellees made it plain at this trial that they were acquainted with and understood the meaning of the reflector type sign which was 675 feet from the crossing.

It was further undisputed that the lights were up or in "bright" position, and Mississippi Law required that they be such as "to reveal persons and vehicles at a distance of at least 350 feet ahead for all conditions of loading."[5]

It is plain, therefore, from the undisputed testimony that a motorist who was looking ahead as required by law would be bound to see the reflective type sign 675 feet away, the Mississippi Stop Sign located as required by

[5]6 Miss. Code 1942, §8240, 1954 Cumulative Supp., §8229.11

law, and the moving freight cars when the automobile was not less than 350 feet from the point of impact.[6] The only conclusion which can be drawn is that these appellees were paying no attention to road signs or to the road itself; but they were "charged with having seen what was so plainly open" to them. *Deitz* v. *Greyhound Company, infra.*

The experiment which furnished such important testimony at the trial below was conducted by placing at several points along the track, a railroad engine of the same type as that in use the night of the accident and pulling freight cars of like kind, and having the witness McCullough take his position on the highway to determine the points at which he could be seen by engineer Mobley. The latter took his seat on the right side of the engine exactly as he was on the night of the accident. The boiler and other superstructure of the engine made it impossible for him to see any part of the highway by looking out of his own window. By looking across, past the end of the boiler, he could see a small segment of the highway through the fireman's window. It was undisputed that, on the night of the accident, he was engaged in observing portions of the mechanism he was required to inspect in the cab of the engine when his eyes caught the flash of the automobile's headlights as he was able to observe it through the small fireman's window. The crucial question in the case throughout has been, where exactly was the Murray car when the engineer first saw it? This question was answered by exact measurements made in

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[6]Under Mississippi decisions a motorist is bound to keep his car under such control that he can stop within the range of vision afforded by his lights and has no right to assume that the road ahead of him is clear. *Planters Co.* v. *Kincaid*, 1951, 50 So. 2d 578, 583; *Jackson City Lines* v. *Harkin*, 1948, 38 So. 2d 102, 104; *Rhodes* v. *Fullilove*, 1931, 134 So. 840, 843, and cases therein cited.

the experiment which duplicated precisely the situation at the time of the accident.

The engine was stopped when it was three car lengths from the center of the crossing, and Civil Engineer McCullough walked up the highway until Locomotive Engineer Mobley motioned him to stop. McCullough was then 200 feet from the point of collision. The engine was thereupon stopped when it was six car lengths from the crossing, and McCullough walked up the highway until Mobley stopped him, and that point was 392 feet from the point of impact. By the same means it was determined that, when the engine was eight car lengths from the crossing, McCullough was visible 503 feet from the point of impact, and when the engine was nine car lengths away McCullough was visible 558 feet from that point.[7]

This experiment proved that Engineer Mobley, focusing his eyes and centering his attention exclusively on McCullough could see him in the day time as he stood on the road at the points mentioned. This removed from the realm of speculation all doubt as to when Mobley could possibly have seen the car the night of the accident, assuming that his attention was centered upon it at the first fraction of a second it became visible.

By measurements, therefore, which, under Mississippi Law, we must accept to the exclusion of mere estimates,[8]

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[7]The conductor testified that the marks showing where the automobile struck the train were on a red box car which was the ninth car from the engine and his testimony was corroborated by that of other witnesses and is made certain by the photographs in evidence showing the marks of the impact. He further testified that the train stopped with the twelfth car on the crossing.

[8]"The testimony even of a disinterested and unimpeached witness on the subjects of measurements, distances and the like,

it is demonstrated that, *at the time of impact,* it was a physical impossibility for the engineer to see an automobile on the road further than 558 feet from or 6.36 seconds before, the instant of impact. Even if it should be supposed that the engineer first got a glance of the automobile when it was 6.36 seconds from the collision (in other words, eliminating the known fact that it had to traverse the distance between the point of supposed sight and the point of collision), the evidence would not be sufficient to establish that it was reasonably probable that the engineer, acting as the average prudent man under the circumstances, could have done anything effective to rescue appellees from their self-imposed peril. But it was further undisputed that the automobile was traveling at sixty miles per hour, or eighty-eight feet per second, and that the engine was moving ten to fifteen miles per hour, so that the time at which it was physically possible for the engineer to see the automobile must be moved nearer the collision point at least two to four seconds.[9]

Moreover, appellee Murray testified that, "Maybe a second or two" elapsed between the time he first saw

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which is based merely on memory, estimate or casual observation, must yield to that which is based on actual measurement." *S. H. Kress & Co.* v. *Sharp*, 1930, 156 Miss. 693, 126 So. 650, 651; and see *Hardaway Contracting Co.* v. *Rivers*, 1938, 181 Miss. 727, 180 So. 800, *M. & O. R. R. Co.* v. *Bryan, infra,* and 52 C. J. S., Evidence, §492.

[9]This calculation would verify the estimate made by Engineer Mobley and Brakeman Gibson that the automobile was between three and four hundred feet from the crossing when Mobley first saw it and called to Gibson. This was the only testimony on the subject, and represents nothing but their estimates which, under the circumstances, have probative value only as they are corroborated by facts established by such means as measurements and photographs.

the train, thinking it was a wagon which he could go around, and the time he discovered it was in fact a train.[10] He had told the Court that the distance was about 150 feet; which tends to verify that the time lapse was between one and two seconds between the time he discovered the presence of the obstacle in his path and "hit my brakes" and the time of collision.[11]

The facts established by the maps, photographs, and actual measurements demonstrate, therefore, that Engineer Mobley had only two to four seconds to act effectively to prevent the collision after his first glimpse of the car. He testified that he saw the car only as it flashed by the fireman's window and passed out of his sight. He called to Brakeman Gibson, who was occupying the fireman's seat on the side of the engine towards the road,[12] and asked if the car was going to stop. Gibson,

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[10]"Q. You are telling this Court now that just as soon as you saw this box car you turned to the right and put on your brakes; is that right? A. Yes, sir. Q. How many seconds would you say elapsed from the time you thought it was a wagon going along the road that you discovered it was a box car? A. Maybe a second or two. Just as soon as I saw a box car, I knew it wasn't a wagon. Q. You were going approximately 60 miles an hour when you first thought this was a wagon; is that right? A. Yes, sir. Q. And you continued on at that speed until you made up your mind it wasn't a wagon and realized it was a box car; is that right? A. I hit my brakes. I didn't want to run into a wagon either * * *."

[11]A chart published by "Affiliated Aetna Life Companies" and distributed generally in the State of Mississippi by the Department of Public Safety shows that the average driver moving at sixty miles per hour, requires a distance of 226 feet—substantially the length of the straight stretch of road—to stop an automobile after "danger is first perceived."

[12]The fireman was putting in a fire and did not see the car, but heard the conversation.

who was keeping a lookout ahead as required by his duties, had to turn around and look backward along his train and he saw that the car was too close to the train and was moving so fast that it could not be brought to a stop, and he replied with an immediate "No." From this it is clear that the automobile had passed the "point of no return," 226 feet, when the engineer received the warning.

This was the first moment that the law or the dictates of humanity required action on the part of Mobley. Action required prior realization and evaluation of the peril, decision as to what was best to do, and doing what judgment dictated. The engineer, controlling a heavy mechanism whose nature was to do harm chiefly by its movement, set about to stop that movement. This involved throwing his throttle into neutral—he was working steam, bringing his speed up to its norm—and seizing the brake-lever and placing it in the notch best adapted to accomplish the quickest stop consistent with safety.

He testified that there was not time to do more. And who can advance convincing argument that the engineer did not, in the emergency he faced because of appellee's negligence, do what was reasonably required of the average prudent man under the circumstances? Certainly not the Supreme Court of Mississippi, which, under quite similar circumstances has held in more than one case that the time element thus accurately fixed in this case was not enough to fasten liability under the doctrine of Last Clear Chance.[13]

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[13]It should be borne in mind that Mississippi has a comparative negligence statute, §1454, Code of 1942, and that contributory negligence, however great, never bars recovery. The doctrine of discovered peril or last clear chance, so important in states where contributory negligence is a complete defense,

The case of *Brookhaven Lumber, etc., Co.* v. *Illinois Central Railroad Co.*,[14] cited and quoted from as announcing the Mississippi rule as to action in emergency, by the Mississippi Supreme Court in *Vann* v. *Tankersly*, (1933) 145 So. 642, involved the action of an engineer who discovered, when a distance of 300 feet away and when he was running 35 miles per hour, that a switch was open. He did not act effectively to reduce the speed of his train until it had passed through the open switch. The result was that the engine plowed into a lumber mill and set it afire, and destroyed it. In the suit brought against the railroad—in which the evidence showed that its employees had not left the switch open—complaint was made of the failure of the trial Court to give an instruction fixing liability upon the railroad if the engineer actually discovered the open switch in time to avoid the ensuing collision and failed to utilize the means at hand to avoid it.[15] The Mississippi Supreme Court approved the rejection of that instruction, holding *as a matter of law* that six seconds was not an unreasonable time in which to

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loses most of its meaning and importance in Mississippi. This explains why most of the cases applying the doctrine are old cases.

[14]10 So. 66 (1890).

[15]The refused instruction was in these words: "The Court instructs the jury that, although they may believe from the evidence that the switch was open through no negligence of the railroad company, yet if they believe further from the evidence *that the engineer discovered that the switch was open while at a sufficient distance therefrom to have stopped the train before its collision* with the lumber-shed, and that, though discovering the danger, he *failed to resort to such appliances* as, if resorted to, would have prevented such collision and consequent fire * * * then the failure to stop the train was such negligence as to render the defendant railroad liable for any injury to plaintiff's property that so resulted." [Emphasis supplied.]

size up the unexpected situation and act to prevent the impending catastrophe. Its words are found on page 69 of the Reporter:

> "Of course, if the engineer had reasonable time and *fit opportunity* to prevent the impending calamity, and failed to do so, the appellee is liable; but in the case at bar, with its facts finally resolved, if liability is to be raised, *about six seconds must be held reasonable time in which to make ready to use* the various appliances for stopping a train, and in which to actually put into effective operation such appliances (for the train would be in the very jaws of the open switch in about six seconds from the time of its discovery by the surprised engineer), * * * But we forbear to press remark further on this point, and content ourselves by saying that the engineer was only required to act in view of what he then saw, situated as he was, and that, suddenly and unexpectedly confronted with a complicated difficulty impossible to have been foreseen, he is not to be held accountable for failure to exercise that cool and unembarrassed and unerring judgment which we, freed from sudden surprise and danger, could now form and execute. He appears to have done the best he could, situated as he was, and nothing more could reasonably be required of him." [Emphasis added.]

Concluding as a matter of law that three seconds did not give an engineer time enough to do anything to prevent a crossing accident, the Supreme Court of Mississippi reversed and dismissed a judgment based upon a jury verdict awarding a large amount for the death of a lady at a public crossing.[16] A number of eye witnesses gave conflicting versions of what actually happened, but the Mississippi Court pushed them aside because it had photographs and actual measurements from which the de-

[16]*Mobile & Ohio Railroad Co.* v. *Bryant*, 1931, 132 So. 539.

termining facts were established. We quote a portion of the opinion found on pages 540 and 541 of the Reporter:

> "The maps and photographs, together with the testimony in respect to actual measurements, show that the distance from the center of the road, where the curve begins for the crossing, to the main line track is forty-three feet. * * * This placed her, therefore, when she began to negotiate the turn, within less than forty feet of the track on which she was hit. Consequently, *only three seconds elapsed* from the time she turned westward into the crossing until she arrived on the main line track and was struck.
>
> "It would require some moment of time after the driver of the automobile had begun the turn into the crossing for the impression or conclusion or realization to register upon the mind of the locomotive engineer that the said driver did not intend to stop; it would require a second for the engineer to get hold of and turn the brake valve, and another second to triple, and for the brakes to take hold, in response to the said valve, the said latter propositions being undisputed in the evidence, and then, as a matter of common sense, certainly another second would intervene before any appreciable response in the reduction of speed of a train running twenty-five miles an hour would result. Thus the three seconds of time that were available here would have elapsed without any reasonable possibility, to say nothing of probability that within his hopelessly short time anything effectual could have been done by the engineer to avoid the collision. *Three seconds are only one breath in the respiration of a normal person.* Let us look at the second hand on a watch and consider how futile that space is for the effectual checking of a railroad train * * *.
>
> "* * * 'It is to be observed also that these instructions are capable of the construction that it was the duty to maintain a lookout beyond the right of way and to anticipate that a person traveling in

proximity thereto would, without taking any precaution in his own behalf, drive suddenly upon the track. A large part of the railroad mileage in this state is skirted on one side or the other by highways with numerous crossings, leading therefrom. It is enough to say, without more, that, if this character of lookout were required, there would be, in order to avoid possible liability, an intolerable recurrence of the throwing on of emergency brakes and an inadmissible interference with the efficient movement of the commerce of the country.'

"* * * *These photographs disclose the facts to us by way of demonstration, and we apply the law to the facts demonstrated—any verdict to the contrary notwithstanding* * * *.

"The facts of this case, when examined with impartial reason, under the law, are not sufficient to sustain a verdict against the appellant. The judgment is therefore reversed, and the case dismissed." [Emphasis added.]

Sitting as the Court below was and as we are, as a Mississippi Court,[17] we are bound by the Mississippi law as thus announced by its Supreme Court. The cases making similar holdings are numerous,[18] and the Mississippi rule is not out of line with that generally applied. We recently held that liability under the Last Clear Chance doctrine was not established sufficiently to warrant submission to a jury in a case where a bus driver was charged with failing to utilize a three second interval in which he was forced to act in such a way as to avoid killing the driver of a Buick automobile.[19]

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[17]*Angel* v. *Bullington*, 1946, 330 U. S. 183.

[18]*e. g., Mobile & O. R. Co.* v. *Johnson*, 157 Miss. 266, 126 So. 827; 165 Miss. 397, 141 So. 81; and *Hancock* v. *Illinois C. R. Co.*, 152 Miss. 668, 131 So. 83.

[19]No. 15909, *Mrs. Nita Bergeron Deitz et al.* v. *The Greyhound Corp.*, June 5, 1956, ... F. 2d ....

Deitz, the man who was killed, entered a highway upon which the bus was running at fifty-five miles per hour, at a point two hundred thirty feet in front of the bus. The bus driver assumed that the Buick would turn to its right and proceed in the same direction the bus was moving, and accordingly the driver pulled over into the left lane to pass the Buick. It developed instead that the Buick driver intended to cross over and turn to his left into the left lane which the bus had occupied, with the result that the bus struck the Buick and killed the driver. It was fervently argued that, if the bus had continued in a straight course instead of pulling to its left, the accident would have been avoided and that the bus company was liable because its driver negligently elected to take a course which turned out to be the wrong course. We analyzed the facts as demonstrated by the sketches, the photographs and the measurements, considered the speed at which the respective vehicles were moving, and the number of seconds thus demonstrated as available for action, and gave those established facts dominance over inconsistent statements by the bus driver and other countervailing testimony, and concluded that, as a matter of law, the doctrine of Last Clear Chance had not been made applicable by the evidence.[20]

This conclusion was reached under Louisana Law where contributory negligence is a complete bar to recovery and whose Last Clear Chance doctrine is much

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[20]Our conclusion was: "There is no showing of any evidence that at its speed, in this situation, the bus could then have stopped, or, in that fleeting moment, it could or ought to have pulled to the right instead of the left. For it to have been a Last Clear Chance in law, *the plaintiff must prove it to have been one in fact* with a means actually open to the bus which, consistent with equally dominant necessity of safety to its own passengers, prudence required it to take." [Emphasis supplied.]

more liberal in favor of recovery than in Mississippi. For instance, under Louisiana law the test is applied from the point where the party charged ought to have discovered the peril.[21] In Mississippi there must be a "clear" chance after the peril is actually discovered and actually appreciated. See Mississippi cases cited and quoted from in our former opinion (205 F. 2d 63-4).[22]

We have, in other cases, so applied the doctrine of Last Clear Chance as to require that we declare it inapplicable to sustain a recovery here.[23] And the Court of Appeals of the Second Circuit held that an instruction on Last Clear Chance ought not to have been given where the interval in which a motorist could act was only three seconds.[24]

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[21]Cf. *Rottman* v. *Beverly*, 1935, 183 La. 947, 165 So. 153; *Jackson* v. *Cook*, 1938, 189 La. 860, 181 So. 195; *Bergeron* v. *Department of Highways*, 1952, 221 La. 595, 60 So. 2d 4; *Brown* v. *Louisville and Nashville Railroad Co.*, 1955, E. D. La., 135 F. Supp. 28, affirmed May 25, 1956, ... F. 2d ... .

[22]All of the Mississippi cases cited here involved the action of railroad operatives *in running trains into persons*—mostly at crossings—who had gotten themselves into perilous positions in front of moving trains. No case has been cited or found where the doctrine of Last Clear Chance has been applied against the party charged with negligence, having no legal duty with respect to the person injured, who has *failed merely to warn* the injured party of the *presence* of the instrumentality located where it had a right to be, and being operated without negligence.

[23]See *e. g. Lapuyade et al.* v. *Pacific Employers Insurance Co.*, 1953, 202 F. 2d 494; *Atlantic Coast Line Railroad Co.* v. *King*, 1952, 196 F. 2d 999; *Humphries* v. *Boersma et al.*, 1951, 190 F. 2d 843; and *Shoen* v. *Western Union Telegraph Co.*, 1943, 135 F. 2d 967.

[24]*Mulberg* v. *Mason & Dixon Line*, 2 Cir., 1946, 157 F. 2d 805, 806: "The inapplicability of the doctrine to the facts of the case at bar appears to us to be obvious. No danger of collision was apparent to the truck driver until the Mulberg car began to skid

To recover under the Last Clear Chance doctrine it was incumbent upon the appellees to show not only that the engineer failed to act with due care after appreciating the danger, but that he had means available by which he could have taken steps which would probably have avoided the collision. Appellees claim that the engineer ought to have blown his whistle in addition to or instead of stopping the train when the peril was discovered. Aside from the rule which relaxes strict requirements of care when acts are performed in emergency, so liberally applied in Mississippi,[25] any conclusion that the blowing of the whistle would have avoided the injuries would be based entirely upon speculation. The best answer to that argument is furnished by the language of the Supreme Court of Mississippi in *New Orleans and Northeastern Railroad Co.* v. *Burge*, 1941, 2 So. 2d 825.

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when it entered the south end of the bridge. From that point to the point of impact the automobile traversed about two hundred twenty-five feet while the truck was covering * * * about one hundred feet * * *. While the jury was not bound to accept the testimony as to the precise location of the respective vehicles or their rates of speed—sixty miles an hour for the automobile and thirty-five for the truck—*it could not construct a situation out of whole cloth*; * * * *Harris had only about three seconds in which to act after the time for action arrived.* Consequently it would have been erroneous to *let the jury conjecture* that he could have avoided the accident by exercising reasonable care after he became aware of the danger * * *" [Emphasis added.]

[25]This liberality is well illustrated by *Vann* v. *Tankersly*, (1933) *supra*, where an eighty-year-old man backed into and seriously injured a person seated on a bench on the sidewalk. Vann was backing his car out from the curb when his wife, seated beside him, began falling out of the door she had failed to fasten securely. Lunging to seize hold of his wife, Vann lost his head, pressed hard on the accelerator, turned loose the steering wheel and backed rapidly across the sidewalk and into the wall of a store. The jury awarded Tankersly, badly injured, a verdict. The Mississippi Supreme Court reversed and rendered judgment in Vann's favor.

Burge claimed that he ran into the side of an engine at a public crossing, not seeing the locomotive until he was within about four feet of it, which he attributed to the fact testified to by him that the statutory whistle and bell signals were not given as the train approached the crossing. The case was submitted to a jury which returned a verdict in plaintiff's favor and the Supreme Court reversed and rendered judgment in favor of the railroad company:

> "* * * it put an intolerable strain on credulity that reasonable men should be asked to believe, * * * that as a matter of reasonable likelihood the ringing of a bell on that locomotive would have substantially contributed to an effective awareness on appellee's part * * *. Of such a state of facts could men of sound discretion, acting impartially, say with real reason otherwise than it was highly probable that, if the locomotive bell had been rung, there still would have happened to appellee, so far as he was concerned, what did happen?"

After discussing the fact that the injured man did not see the headlight and did not hear the roar of the train, the Mississippi Court concluded with this language:

> "The problem becomes, then one of the quantum of proof and the burden of proceeding therewith. And as in all other cases, possibilities and conjectures are excluded from the equation. *It is not enough for the injured person, who has primarily the burden of the proof, to say that had the required precautions been taken by the opposite party, the injury might possibly have been avoided, or to propound a conjecture to the same effect* * * *.
>
> "To say on the record in the present case that had the required signals been given the injury would not have occurred is to invoke a possiblity or conjecture, and it is not within the legitimate province or power of a jury to convert a possibility into some-

thing more by the mere force of a verdict. Teche Lines, Inc. v. Bounds, 182 Miss. 638, 649, 179 So. 747

* * *. In view of what is disclosed by this record taking all that the plaintiff says as true together with the undisputed physical facts it is clear as a matter of all reasonable likelihood that appellee would not have heard the bells if two instead of one had been rung. The facts amount practically to a demonstration that he was both deaf and blind to everything except what he himself was doing, his sensibilities were in an evident state of unresponsiveness to all else; and thus the failure to ring the bell * * * disappears as a substantial factor in bringing about the injury; hence appellee cannot recover. Reversed and judgment here for appellant." [Emphasis added.]

Under the Mississippi cases discussed, and accepting as we must the plats, the photographs and the measurements about which there is no dispute, to the exclusion of pure estimates in conflict therewith,[26] it is plain that appellees did not make a case against appellant and that the Court below should have directed the jury to find for the appellant. For its error in failing so to do the case is reversed and a judgment rendered here in favor of appellant.

REVERSED AND RENDERED.

A True Copy:
Teste:

/s/ John A. Feehan, J.,
Clerk of the United States Court of Appeals for the Fifth Circuit.

(Seal)

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[26]The undisputed and credible evidence given at this trial and the measurements newly furnished by the experiment destroy the assumptions of fact—quoted at the beginning of this opinion—upon which we based the conclusions announced in our decision following the first trial. Those assumptions were predicated largely on testimony, then undisputed and unquestioned, concerning estimates of how far the train probably ran after the brakes were applied. On this trial it appeared that those were mere guesses, based upon the average time normally consumed in such a step. The measurements and the amplified testimony here demonstrated that those estimates had no probative worth.

APPENDIX B.

Factual Conflicts Within Opinion Itself.

Herein we shall point out differences between the facts of record, as the jury was justified in finding them, and between the factual conclusions which the Court of Appeals reached in its second opinion. We shall deal with those matters pertaining to the so-called test or experiment and then, under a separate subdivision, with general inconsistencies in the factual conclusions, disclosing that the facts tried by jury were not re-examined by the Appellate Court of the United States in accordance to the common law and as made mandatory by the Seventh Amendment to the Constitution of the United States.

A. The So-Called Test or Experiment.

The Court of Appeals labeled the so-called test or experiment as "by far the most important additional evidence" and said that this experiment, contrary to the sworn testimony of Engineer Mobley, "demonstrated that it was physically impossible for him to see appellees' car at a sufficient distance from the point of collision to warrant the finding that it was reasonably probable that the engineer could have done anything to prevent the accident." Then it was pointed out by the Appellate Court that, "The *crucial* question in the case throughout has been, where exactly was the Murray car when the engineer first saw it?" And the Appellate Court then factually concluded that "This question was answered by exact measurements made in the experiment which *duplicated precisely* the situation at the time of the accident." That this experiment did not *duplicate precisely* the situation at the time of the accident and that the Appellate Court should not have concluded that the experiment destroyed and sup-

planted the other evidence of record is clear from the following:

1. The experiment was conducted on November 10, 1953, in bright daylight. The accident occurred on April 11, 1950, on a dark night—the Appellate Court in its opinion saying, "the night was dark but clear." We respectfully insist that there is truly a difference between night and day and that that difference should be recognized by the Courts, as it has been over the ages and as it was indeed admitted by the engineer himself (R. 312). It is wrong, we believe, to judicially hold that there is no such difference and that therefore an experiment conducted in clear daylight "duplicated precisely" the situation when it was plumb dark.

2. Leaving aside all of the other differences, Judge Cameron recognized that the experiment depended upon where the engineer *said* he saw a lone man (the civil engineer McCullough) walking up the highway in a direction different from that in which the car was traveling on the night in question. Then the Court concluded that the *statements* of this witness, McCullough (the Respondent's civil engineer), as to where the engineer signaled him to stop, in the words of the opinion, "removed from the realm of speculation all doubt as to when Mobley could possibly have seen the car the night of the accident, assuming that his attention was centered upon it at the first fraction of the second it became visible." Now it was the lights of the car which the witness Mobley said he saw—Judge Cameron stating that "his eyes caught the flash of the automobile's headlights as he was able to observe it through the *small* fireman's window." Incidentally, there was no proof whether the fireman's window was small or large and the dimensions must have come from the assumption of the Judge instead of the facts of record. Judge Cameron held

that the beam of the lights of the car should have extended through the darkness some 350 feet ahead of the path of the car. Therefore, we suggest that before the experiment should have become gospel the experiment should have been conducted on a dark, clear night. The witness McCullough should have been traveling south on the highway instead of north as he was walking. The witness McCullough should have equipped himself with two headlights which had a penetrating beam of at least 350 feet (the latter according to the opinion of the Appellate Court) and then Engineer Mobley should have been asked when he could see the lights. That (though still dependent upon the credibility of the witnesses) would have come closer to duplicating precisely the situation which existed at the time of the accident. Actually, the witness McCullough expressly conceded that the lights of the car at night would have been seen and therefore the presence of the car would have been known when the car was much further distant than was the result of a test dependent upon the presence of a man in or near the highway in the daytime (R. 269).

3. The opinion recites that for the purpose of making the test the engineer "took his seat on the right side of the engine *exactly* as he was on the night of the accident." The evidence, and the only evidence of record as to this, is found in the following question addressed to the engineer by the Railroad's counsel and the following answer:

> "Q. Were you sitting in the *same general position* that you were at the time the accident happened?
> A. Yes, sir."

Therefore we find that the engineer, answering a leading question, says that he was in the "same general position" when he was making the test as he was when the accident happened—whether he meant at the time that the

car hit the train after it was stopped, we do not know and he did not elaborate. It all depends upon his credibility, but we tarry to point out that the engineer never swore that he was *exactly* in the same position. The engineer never testified that on the night in question he did not lean over to his left; but when making the test he sat in a rigid position—the civil engineer, McCullough, admitting that he was "sitting in a still position and *not moving.*" (R. 270). The following portions of the examination of the witness McCullough should, we think, demonstrate that the Appellate Court erred in substituting its factual conclusions for those of the jury and in holding that the situation at the time of the test was precisely the same as it was at the time of the accident:

> "Q. You don't know whether on the night of April 11, 1950, the engineer was leaning out to the left or right? You don't know that and make no attempt to state that?
>
> A. No.
>
> Q. You make no attempt to tell the jury the lights on a car or a vehicle could (not) be seen at a greater distance than an individual standing in the middle of the road in the daytime?
>
> A. No, that is not my testimony.
>
> Q. An engineer who would sit rigid on the right side in his seat looking straight out, perpendicular out of the window, would have less vision than one who happened to be leaning over and looking out? As an engineer, you do know that, don't you?
>
> A. *It would change it by moving his position.*
>
> Q. An engineer whose head was moved backwards or sidewards would greatly increase or decrease the angle he could see out of the cab; is that not correct?
>
> A. I wouldn't say 'greatly'.
>
> Q. It would fluctuate?

A. Yes.

Q. If he wanted to see out of the left side, he could lean over and that would materially and greatly change the distance that he could see; isn't that correct?

A. *It would change the distance, yes.*

Q. You don't tell this Jury that an engineer couldn't see the lights of an automobile as it hit the Airport Road?

A. Our test did not extend that far.

Q. Your test was of a man sitting erect in an engineer's seat in the daytime looking at a man walking down the highway?

A. Mine represents what an engineer could see sitting in a normal position on his seat. He could see me moving down the highway.

Q. And *sitting in a still position and not moving?*

A. That's right." (R. 268-270).

Remember that the testimony of the brakeman was that the engineer "looked over" and saw the car when it was up at the intersection by the Airport Road—900 feet distant—and it was then that he called his attention to the car and asked him if he thought the driver was going to see the train in time to stop, or words to that effect. The fact that the engineer swore that he was in the "same general position" at the time he made the test on November 10, 1953, as he was at the time of the accident on April 11, 1950, even if true would not be the whole or sufficient answer. For example, all of us drive cars and, as drivers, uniformly take the "same general position" behind the wheel. The situation might be fairly compared with a person driving an automobile who would be sitting in the driver's seat who in one instance could lean out and see an object on the ground beneath him and alongside the car, whereas if he was making an experiment and sitting rigidly, though in the same seat, could not see such an object.

Engineer Mobley never undertook to change his sworn testimony nor did he deny the testimony of the brakeman Gibson that he had seen the car when it was up by the Airport Road. The change which the Railroad attempted was through the testimony of its civil engineer, McCullough, who was not present at the time of the accident and who knew nothing of it except from hearsay.

4. There are even errors, or discrepancies, in the measurements themselves. For instance, the plat of the railroad shows that the engineer, when making the experiment, was stopped at three different distances, viz.: 129 feet, 258 feet and 387 feet north of the crossing. These distances are not even correct, or at least do not comport with the testimony. The reason for this is that the evidence was that the box cars were 50 feet in length, or so testified the engineer (R. 139). While McCullough said the average box car length was 43 feet, he admitted that many were 50 feet, with "some longer than 50 feet." (R. 278). In addition to this, there was no provision made for the tender, which is probably another 25 feet. Therefore 3 car lengths plus the tender would have been 175 feet, 6 car lengths plus the tender would have been 325 feet and 9 car lengths plus the tender would have been 475 feet. Therefore, all of the measurements were made from points which were approximately 46 feet to 88 feet out of kilter with the engineer's own estimates upon which the test was predicated. This difference itself shows that there was no precise duplication of the situation.

B. In General.

(a) The Appellate Court in its last opinion stated:

"It is plain, therefore, from the undisputed testimony that a motorist who was looking ahead as required by law *would be bound to see* the reflective

type sign 675 feet away, the Mississippi Stop Sign located as required by law, and *the moving freight cars when the automobile was not less than 350 feet from the point of impact.*"

Yet as shown by the portion of the former opinion of the Appellate Court there was evidence that "a car coming around the curve would be *only about 150 feet away* from a train occupying the crossing *when the lights first shone on the train.*" This same evidence was again produced from the investigating officer (R. 113-114). In fact there is no dispute that, because of the curve, the lights would not pick up the train until too close—about 150 feet away as Murray swore, with his evidence in this regard being referred to in the opinion. It was knowledge of that fact (since the Railroad at that time had not protected this main crossing of a U. S. Highway with flash and gong signals) which caused the railroad crew to apprehend the danger when the car was traveling at the legal rate (60 miles per hour) almost 900 feet away at the airport road.

Therefore when the Appellate Court held that the "undisputed testimony" disclosed that Murray "would be bound to see * * * the moving freight cars when the automobile was not less than *350 feet* from the point of impact," that Court clearly erred, the evidence, otherwise quoted in the opinion, showing that distance to be, at the most, 150 feet.

(b) The Appellate Court has stated, as above shown, that the lights on Murray's car would reflect on objects at least 350 feet distant. YET, the Court assumed and held certain facts to be "undisputed" based on an experiment concerning the presence of a lone man in the road in the daytime, wholly disregarding the fact that the Murray car was equipped with proper lights, the penetrating beam

of which lights the Court otherwise holds extended at least 350 feet ahead of the car.

(c) The Appellate Court in its last opinion stated:

> "* * * It was further undisputed that a series of moving railroad cars were passing along in front of appellees which these sketches show *would have been clearly visible* to one looking *even before the straightaway was reached;* that the car had perfect headlights, and the night was dark but clear."

As shown by the plat, and from the quotations from the first opinion, "The highway was practically straight for a distance of 225 feet just north of the crossing, though the investigating officer testified that in his opinion a car coming around the curve would be only about 150 feet away from a train occupying the crossing when the automobile lights first shone on the train."

Therefore, if the first opinion and the testimony of record of witnesses is correct, the train on the crossing would not be "clearly visible" or visible at all at night until after the curve was negotiated. The same pictures and the same plat were introduced at each trial and sent up to the Court on both the first and second appeals.

(d) The Appellate Court in its last opinion, adopting the factual argument and version of the Appellant Railroad which the jury rejected, states that: "From this is it clear that the automobile had passed the 'point of no return,' 226 feet, when the engineer received the warning."

Yet, Brakeman Gibson swore that Engineer Mobley had seen and asked him about the car when it was at the Airport Road, 900 feet distant, and he had warned the engineer when it was 400 feet distant. Further, this statement discounts the fact that the engineer applied the brakes and brought the slow moving train to a stop across the

highway (taking 3 or 4 car lengths to do so) before the car, traveling 60 miles per hour, reached the crossing.

(e) The Appellate Court has now stated:

> "The engineer, controlling a heavy mechanism whose nature was to do harm chiefly by its movement, set about to stop that movement. This involved throwing his throttle into neutral—he was working steam, bringing his speed up to its norm—and seizing the brake-lever and placing it in the notch best adapted to accomplish the quickest stop consistent with safety."

Yet there was no evidence—none—of record regarding all of this. The engineer simply stated that he put it in emergency, and the brakeman swore that he did this "immediately" for "all he had to do was put the brake lever on." (R. 290).

APPENDIX C.

Conflicting Opinion.

Baltimore & Ohio R. Co. v. Deneen, 167 F. 2d 799 (C. C. A. 4th).

There involved was a review on the second appearance of the same case before the Fourth Circuit of Appeals. The portions of the opinion relative to the "law of the case" are here indeed apt. From the opinion by the Fourth Circuit (Judges Parker, Soper and Dobie, Circuit Judges), we quote:

> "See, also, the opinion of Circuit Judge Simons, in *Carpenter* v. *Durell,* 6 Cir., 90 F. 2d 57, 58, 59:
>
> 'The doctrine of the law of the case has no application to questions of fact, but is limited to questions of law, and is *always applied* where the former decision *relates to the sufficiency or insufficiency of the evidence.* When the case comes up the second time and the evidence is substantially the same, a former decision is conclusive. * * * A determining factor in the application of the doctrine is the *substantial similarity* of the evidence in the second case with that in the first.'
>
> There were, of course, differences between the evidence introduced at the first trial of this case and the evidence at the second trial. The defendant-railroad, at the second trial, introduced more elaborate evidence as to the ringing of the crossing-bell; and some of the witnesses who testified at both trials (possibly with their memories dimmed by the passage of time), were not as positive or as definite at the second trial as they had been at the first. We think, however, that these differences between the evidence at the first trial and the evidence at the second trial, were neither important nor substantial. Accordingly, the judgment below might well be affirmed under the doctrine of the law of the case."

And then, showing that the effect of, or weight to be accorded to, a test or experiment "was peculiarly in the province of the jury," the Fourth Circuit Court of Appeals in said case held:

> "Evidence, quite technical in nature, was introduced by the defendant-railroad in an endeavor to show that, with the plaintiff's car in the position it occupied at the time of the accident, the condition of the crossing did not cause the stopping of the plaintiff's automobile, and thus defendant's negligence in this connection had no causal connection with the accident. *The weight to be given to this testimony, with the attendant power to resolve any conflicts here between the evidence of the plaintiff and that of the defendant, was peculiarly in the province of the jury.*"

Lever Bros. Co. v. Atlas Assur. Co., 131 F. 2d 770 (C. C. A. 7th).

There, speaking through Judge Minton as the organ of the Court, the Court of Appeals for the Seventh Circuit (regarding the effect of an experiment and that "its weight was *of course* for the jury under all circumstances") held:

> "If there is some similarity of conditions, the weight of that evidence would be in proportion to the evidence of similarity, the greater weight to be given where there is greater similarity and the lesser weight where the similarity is less. But if there are valid points of similarity, as there were in the case at bar, such as the same tank and equipment, the same kind of oil handled in the same general way, refined in the same process, in which the same amount of water was used, and pumped through the same pipes (into which, when necessary, steam was blown to clear them out), and in view of the fact that there was direct testimony that such tanks when rubbed out always have water in the bottom, we think the evidence is admissible, *and its weight was of course for the jury under all circumstances.*"

Health Products Corp. v. Ex-Lax Mfg. Co., 22 F. 2d 286 (C. C. A. 2d, 1927).

There, showing that there is always great reluctance to place much, if any, weight on an experiment *post litem motam*, the Court of Appeals for the Second Circuit pointed out:

> "The plaintiff attempts to discredit the defendant's proof that evidence to the disclosure will not produce a laxative gum, by appealing to the well-known reluctance of courts to place much weight upon ex parte experiments. Keuhnsted v. Farbenfabriken, 179 Fed. 701, 709 (C. C. A. 7); Rynear v. Evans, (C. C.) 83 Fed. 696. The reasons which justify that reluctance do not extend to what is done ante litems motam, when there is no motive to fabricate."

Harrison v. Southern R. R. Co., 46 So. 408, 93 Miss. 40.

There the Supreme Court of Mississippi, the highest Court of that State, through Chief Justice Whitfield, proclaimed that such an experiment (as at bar) was only competent "to go to the jury for whatever they might think it worth."

The general or Universal Law on the subject is gleaned from the following text:

From *32 C. J. S.*, "Evidence," Sec. 592, p. 443, "Weight of Evidence":

> "All the circumstances under which experiments were made may be considered in determining the weight to be attached to them. The jury is at liberty to give what weight it sees fit to evidence of experiments. All the circumstances under which experiments were made may be considered in determining the weight to be attached to them, including the similarity existing between them and the actual occurrence, the facts of which are under investigation."

From 20 Am. Jur., "Evidence," Sec. 1203, p. 1054, "Experiments and Test":

> "The weight to be attached to experiments is a question *for the determination of the jury* and varies according to the circumstances of similarity or dissimilarity that *the jury may find to exist* between the experiments made and the occurrence under investigation."

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Supreme Court of the United States

OCTOBER TERM, 1956.

No. 642

NATHAN R. UNDERWOOD AND RICHARD M. MURRAY, JR.,

Petitioners,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS.

	PAGE
STATEMENT OF FACTS	2
PROPOSITIONS OF LAW AND AUTHORITIES	4
I. The Petitioners have not been deprived of any rights under the Seventh Amendment to the Constitution	4
II. The holding of the Court of Appeals for the Fifth Circuit is not in conflict with the holdings of other Courts of Appeal	8
III. There has been no departure by the Court of Appeals from the accepted and usual course of Judicial Proceeding	14
IV. The Court of Appeals in the opinion reported 235 F.2d 868 was correct	17
CONCLUSION	20

TABLE OF CASES.

Angel vs. Bullington, 330 U.S. 183, 91 L.Ed. 832	10
Baltimore and Carolina Line vs. Redman, (1935) 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636	5
Baltimore and Ohio R. Co. vs. Deneen, 167 F.2d 799	8, 12
Cone vs. West Virginia Pulp and Paper Company, (1947) 330 U.S. 212, 67 S. Ct. 752, 91 L.Ed. 849	6
Ex Parte Schollenberger, 96 U.S. 369, 377, 24 L.Ed. 853, 854	10

TABLE OF CASES—(Continued)

PAGE

Guaranty Trust Co. vs. York, 326 U.S. 99, 108, 89 L.Ed. 2079, 2085, 65 S.Ct. 1464, 160 A.L.R. 1231 10

Hardaway Contracting Co. vs. Rivers, (1938) 181 Miss. 727, 180 So. 800 9

Hattiesburg Chero-Cola Bottling Company vs. Price, 141 Miss. 892, 106 So. 771 6

Johnson vs. New York, N. H. & H. R. Co., 344 U.S. 48, 51 5

S. H. Kress and Co. vs. Sharpe, (1930) 156 Miss. 693, 12 So. 650, 651 9

Lever Bros. Co. vs. Atlas Assurance Co., 131 F.2d 770 ..... 8, 12

Madisonville Traction Co. vs. Bernard Mining Co., 196 U.S. 239, 253, 49 L.Ed. 462, 468, 25 S.Ct. 251 10

Messinger vs. Anderson, (1912) 225 U.S. 436, 56 L.Ed. 1152 ..... 15, 16

M. & O. R.R. Co. vs. Bryant, (1931) 159 Miss. 528, 132 So. 539 10

New Orleans & N. E. R. Co. v. Burge, 191 Miss. 303, 2 So.(2d) 825 19

Slocum vs. N. Y. Life Ins. Co., 228 U.S. 264, 33 S.Ct. 523, 57 L.Ed. 879 5

Spilman vs. Gulf and S. I. R. Co., 173 Miss. 725, 163 So. 445 17

Thompson vs. Maxwell Land Grant and R. Co., 168 U.S. 451, 42 L.Ed. 539 15

Vincent, et al. vs. Barnhill, et al., 203 Miss. 40, 34 So.2d 363 6

Virginian Ry. Co. v. Armentrout, 166 F.(2d) 400 (4th C.C.A.) 7

Wilkerson v. McCarthy, 336 U.S. 53 7

Yazoo and Mississippi Valley Railroad vs. Polk, 104 Miss. 339, 61 So. 450 6

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioners contend that four questions are presented by this petition which would authorize the granting of a Writ of Certiorari (pages two and three of their petition). Basically, only three points are raised by these four questions and they are as follows:

1. Have the petitioners been denied the right of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States?

2. Is the holding of the Court of Appeals for the Fifth Circuit in conflict with the holdings of other Courts of Appeal?

3. Did the action of the Court of Appeals so far depart from the "accepted and usual course of judicial proceedings" as to call for an exercise of this Court's power of supervision under Rule 19(b) of this Court?

While these questions couch three legal principles which we will discuss later, primarily the petition is an emotional appeal rather than an exposition of legal principles. The petitioners have glossed over the facts, to such an extent that it is difficult to grasp properly the point at issue. While this court is not primarily concerned with the facts, we feel that a short statement of the evidence will clearly demonstrate that the decision of the court below was correct.

STATEMENT OF FACTS.

This accident happened at about 8:30 o'clock at night. The north-bound sixteen-car freight train had stopped about 30 feet south of a highway crossing for a switching movement. As the train started up and moved over the crossing, it is undisputed that it gave all proper signals. After the train had moved forward nine carlengths, the petitioners' car ran into the side of the train, hitting the ninth car back of the engine. Petitioners approached the crossing from the left at a point where the highway

was virtually straight for several hundred feet. As Judge Cameron points out (page 35 of Petition):

> "The evidence here shows without dispute that the concrete highway upon which appellees approached the point of collision was substantially level (1.13 percent grade); that the curve to the left was very slight (1°30′) and reached a straightaway 222 feet from the railroad track; that appellees faced a reflective type crossing sign, two and one-half feet in diameter with the top five feet from the ground, 675 feet from the crossing and the regular Mississippi Stop Sign 56 feet from the crossing, both of which signs were, by the slight curve, thrown directly into the rays of the car headlights."

The engine had attained a speed of 15 m.p.h., and starting from a dead stop, it, of necessity, could not have averaged 10 m.p.h. Petitioners admit that their speed was 60 m.p.h. or at least six times as fast as the speed of the train. Petitioners accordingly must have been about one-half mile away from the crossing when the engine moved over it.

Murray, who was driving petitioners' car, admits that his automobile was in perfect running order with good headlights and that he saw the train when he was approximately a half city block from the crossing, that he did not try to stop, but under the impression that it was a wagon in the road, he swerved to pass around the wagon. He did not put on brakes until he was right on the train.

There is no claim that the respondent was guilty of any negligence in failing to give the statutory signals before passing over the crossing. The only claim of negligence is based upon the last clear chance doctrine, upon the contention that the engineer who was sitting on the side of the cab opposite the side into which petitioners drove their car should have seen the approaching car, should have realized that the petitioners were not going to stop, and should have given a warning blast of the whistle or should have rung the bell. As will be demonstrated hereafter, the Mississippi Supreme Court does not uphold liability on any such theory.

It is interesting to note that each one of the Mississippi Judges who has had occasion to pass upon the case—Judge Mize who directed the verdict for the Respondent on the first trial, Judge Holmes who dissented on the first appeal, and Judge Cameron who wrote the opinion in the second appeal—has held that there was no liability on the respondent under Mississippi law.

PROPOSITIONS OF LAW AND AUTHORITIES.

I.

The Petitioners have not been Deprived of any Rights Under the Seventh Amendment to the Constitution.

When this case was tried in the District Court, at the conclusion of all of the testimony, the respondent made a motion for a directed verdict which was not granted. A

jury verdict in favor of each of the petitioners was returned and thereafter within the time provided by Rule 50(b), the Respondent filed its motion for a judgment N.O.V. and in the alternative filed a motion for a new trial. Both of these motions were denied by the trial court but on appeal the Fifth Circuit reversed and rendered judgment for the Respondent.

Basically, the contention of petitioners that their rights under the Seventh Amendment have been denied is that the Court of Appeals was without any authority to reverse and render, and that its power was limited solely to reversing and remanding the case to the trial court for a new trial, and for authority therefor relies almost solely on the case of *Slocum vs. N. Y. Life Ins. Co.*, 228 U.S. 264, 33 S.Ct. 523, 57 L. Ed. 879. This Court has repudiated the *Slocum* case in the later case of *Baltimore and Carolina Line vs. Redman*, (1935) 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636, and, as pointed out by Mr. Justice Black in the case of *Johnson v. New York, N.H. & H. R. Co.*, 344 U.S. 48, 51, the confusion caused by the *Slocum* case was the reason for the promulgation of Rule 50(b). What the petitioners are now asking this Court to do is to amend or modify its own Rule 50(b) and to reduce the power of reviewing courts. The refusal of this Court to amend the rule, even at the instance of the advisory committee in 1946, would indicate that the Court is satisfied with the present wording and effect of the rule. Quoting from Mr. Justice Black in the *Johnson* case, *supra*,

> "Rule 50(b) as written and as construed by us is not difficult to understand or to observe. Rewriting the rule to fit counsel's unexpressed wants and in-

> tentions would make it easy to reintroduce the same type of confusion and uncertainty the rule was adopted to end. In 1946 this Court was asked to adopt an amendment to the rule which would have given appellate courts power to enter judgments for parties who, like this respondent, had made no timely motion for judgment notwithstanding the verdict. We did not adopt the amendment then. 5 Moore, Federal Practice (2d ed 1951) 50.01 (7), 50.01 (9), 50.11. No sufficiently persuasive reasons are presented why we should do so now under the guise of interpretation."

See also the case of *Cone vs. West Virginia Pulp and Paper Company,* (1947) 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849.

The holding of this Court is entirely consistent with the Mississippi practice as is shown by the case of *Hattiesburg Chero-Cola Bottling Company vs. Price,* 141 Miss. 892, 106 So. 771, in which that court held:

> "The judgment in this case will have to be reversed, and judgment entered here for appellant. Taking the evidence most strongly for appellee, it falls short of tending to establish a case of liability on the part of appellant. There was, therefore, no question for the jury."

To the same effect see *Yazoo and Mississippi Valley Railroad vs. Polk*, 104 Miss. 339. 61 So. 450, and *Vincent, et al. vs. Barnhill, et al.*, 203 Miss. 40, 34 So.2d 363.

When the facts are not in dispute, as here, it is the duty of the trial court to direct a verdict as Mr. Justice Frank-

furter in *Wilkerson v. McCarthy*, 336 U.S. 53, at p. 65, said:

> "* * * The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge."

Mr. Justice Parker, in *Virginian Ry. Co. v. Armentrout*, 166 F.(2d) 400 (4th C.C.A.) at p. 408, said:

> "The power and duty of the trial judge to set aside the verdict under such circumstances is well established, the exercise of the power being regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right. * * * 'It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice—a power exercised in pursuance of a sound judicial discretion, without which the jury system would be capricious and intolerable tyranny, which no people could long endure. This court has had occasion more than once recently to say that it was a power the courts ought to exercise unflinchingly."

An examination of the foregoing cases will demonstrate that the Seventh Amendment deals with substance and not form, and if, as a matter of law, there is no factual issue for the jury to determine, a directed verdict should be entered by the trial court upon proper motion made. The former common law practice of reserving decision on the motion for a directed verdict as a pre-requisite to

entering judgment notwithstanding the verdict is no longer necessary under the provisions of Rule 50(b). Where, as here, the respondent has made a motion for a directed verdict and has later tendered a motion for a judgment N.O.V. at the conclusion of all of the testimony, which motions have been denied, he may press this point on appeal, and if the court of appeals finds, as it has here, that either motion should have been granted by the trial court, it is within the province and the power and it is the duty of the court of appeals to reverse and render, and such action is not a "redetermination" of any issue of fact under the provisions of the Seventh Amendment.

Rule 50(b), as adopted and interpreted by this Court, does not deprive these litigants of the right of trial by jury as guaranteed by the Seventh Amendment.

II.

The Holding of the Court of Appeals for the Fifth Circuit is not in Conflict with the Holdings of Other Courts of Appeal.

Petitioners assert (Page 15 of Petition) that the Court of Appeals for the Fifth Circuit in effect said: "An ex parte experiment conducted by an interested litigant must, as a matter of law, control over the sworn testimony of the actual witnesses." Petitioners then allege that such assumed holding is in conflict with the holding of the Fourth Circuit in the case of *Baltimore & Ohio R. Co. v. Deneen*, 167 F. (2d) 799, and with the Seventh Circuit case of *Lever Bros. Co. v. Atlas Assurance Co.*, 131 F. (2d)

770. In this they are in error. The statement of the proposition is itself erroneous as the Court made no such holding. The "experiment" was not conducted by interested litigants but was conducted by one McCullough, who was an employee of the respondent but not a litigant, and by Mobley, who was also an employee of the respondent but not a litigant. Mobley was a witness for the petitioners since they placed his deposition in evidence and rely thereon as a part of their testimony in chief. Nor does the experiment conflict with the "sworn testimony of the actual witnesses". The measurements which were made by Mobley and McCullough were directed toward the ascertainment by a definite means of the exact point on the highway at which the car occupied by the petitioners could first be seen. There was no direct testimony introduced by the petitioners as to just how far their car was north of the crossing at the time it was first seen by the train crew. At best, the evidence introduced by petitioners was a wild "guess" as to where the car was located. This guess gave way to the subsequent measurements which were made by McCullough and Mobley which pinpointed to a very high degree of accuracy the exact location of the automobile on the highway at the time when Mobley could first have seen the car.

> "The testimony even of a disinterested and unimpeached witness on the subjects of measurements, distances and the like, which is based merely on memory, estimate or casual observation, must yield to that which is based on actual measurement." *S. H. Kress and Co. vs. Sharpe*, (1930) 156 Miss. 693, 12 So. 650, 651; and see *Hardaway Contracting Co.*

vs. Rivers, (1938) 181 Miss. 727, 180 So. 800; *M. & O. R.R. Co. vs. Bryant*, (1931) 159 Miss. 528, 132 So. 539.

"For purposes of diversity jurisdiction a Federal Court is 'in effect, only another court of the state.'" *Guaranty Trust Co. vs. York*, 326, U.S. 99 108, 89 L.Ed. 2079, 2085, 65 S.Ct. 1464, 160 A.L.R. 1231; *Madisonville Traction Co. vs. Bernard Mining Co.*, 196 U.S. 239, 253, 49 L.Ed. 462, 468, 25 S. Ct. 251; *Ex Parte Schollenberger*, 96 U.S. 369, 377, 24 L.Ed. 853, 854.

In the case of *Angel vs. Bullington*, 330 U. S. 183, 91 L.Ed. 832, this Court announced the following rule:

"The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its border, it contradicts the presuppositions of diversity jurisdiction for a federal court in the State to give such a deficiency judgment. North Carolina would hardly allow defeat of a State-wise policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens."

Paraphrasing the *Angel* case it would certainly be incongruous to say that, though the measurements made by

Mobley and McCullough would be binding and conclusive, if this litigation had been prosecuted to a conclusion in the Mississippi State Courts because the litigation was tried in the Federal Court a contrary result should be reached.

Nor is the holding of the Fifth Circuit in the instant case in conflict with the two Circuit Court cases mentioned by Petitioners in their brief In the case of *Baltimore and O.R. Co. vs. Deneen*, 167 F.2nd 799, a crossing accident was involved and the plaintiff's claim was based solely on the defendant's failure to fulfill its statutory duty of keeping the crossing in proper repair and the alleged causal connection of this failure with the injury to the plaintiff. Numerous witnesses testified for the plaintiff that the crossing was bad. In the face of this overwhelming testimony the Court of Appeals held "there was ample evidence to take to the jury the question of whether defendant lived up to a statutory duty to maintain the crossing in proper condition. Clearly this was a dangerous crossing."

In an effort to overthrow this direct testimony the defendant B. and O. Railroad introduced certain evidence the nature of which is not set forth in the court's opinion, but in disposing of this effort the court made the following ruling:

> "Evidence, quite technical in nature, was introduced by the defendant railroad in an endeavor to show that, with the plaintiff's car in the position it occupied at the time of the accident, the condition of the crossing did not cause the stopping of the plain-

> tiff's automobile, and thus defendant's negligence in this connection had no causal connection with the accident. The weight to be given to this testimony, *with the attendant power to resolve any conflicts here between the evidence of the plaintiff and that of the defendant, was peculiarly in the province of the jury.* (Italics ours.)

Thus it will be seen that in the *Deneen* case there was a sharp conflict of testimony on the very point in issue. Plaintiff's positive testimony in that case is entirely unlike the "guess" in the instant case.

Nor is the case of *Lever Bros. Co. vs. Atlas Assurance Co.*, 131 F.2d 770, cited by Petitioners applicable to the case at bar. The *Lever Bros.* case involved a suit on an insurance policy covering loss or damage by explosion. A large tank belonging to Lever Bros. burst causing extensive damage, and the suit followed. Three distinguished and well qualified chemical engineers introduced by the plaintiff testified that the tank was caused to burst by an explosion occasioned by the presence in the bottom of the tank of a quantity of water that became superheated by the coils in the bottom of the tank and flashed into steam, which generated great power that liberated itself by wrecking the tank. The defendants produced equally well qualified experts who testified that the catastrophe could not have happened as testified to by plaintiff's experts. The plaintiff testified that approximately four months prior to the explosion certain contents of the tank which later exploded had been pumped out and that a substantial percentage of water was found in the bottom of the tank. The defendants objected to this testimony on

the theory that the conditions surrounding the tank on this prior occasion were not substantially similar to those on the occasion under inquiry. In rejecting this objection the Court of Appeals made the statement which appears on page 61 of petitioners' supporting brief. In view of the sharp conflict in the testimony as to the effect that water in the tank may have had in causing the explosion, certainly such testimony was vital and should have been admitted and, in view of the sharp conflict of testimony, it was, under these conditions, a question for the jury, or as Mr. Justice Minton said "under all circumstances" it was for the jury. In the instant case there is no conflict of testimony as to the vital point in issue which was "where was the car when it was first seen by Mobley."

This was clearly pointed out by Judge Cameron in writing the opinion below as follows:

> "The facts established by the maps, photographs, and actual measurements demonstrate, therefore, that Engineer Mobley had only two to four seconds to act effectively to prevent the collision after his first glimpse of the car. He testified that he saw the car only as it flashed by the fireman's window and passed out of his sight. He called to Brakeman Gibson, who was occupying the fireman's seat on the side of the engine towards the road, and asked if the car was going to stop. Gibson, who was keeping a lookout ahead as required by his duties, had to turn around and look backward along his train and he saw that the car was too close to the train and was moving so fast that it could not be brought to a stop, and he replied with an immediate 'No.'. From this

it is clear that the automobile had passed the 'point of no return,' 226 feet, when the engineer received the warning."

III.

There has been no Departure by the Court of Appeals from the Accepted and Uusual Court of Judicial Proceeding.

Petitioners assert that the opinion of the Court of Appeals on the first appeal reported in 205 F.2d 61 has become the "law of the case" and that as a consequence the Court of Appeals on the second appeal, as a matter of form, should have simply affirmed the jury verdict rendered in the instant case. This, to say the least, is a novel claim, especially since the record in the two cases are so dissimilar.

The decision in the first appeal was based upon a record which consisted only of the petitioners' evidence. On the second appeal the appellate court had before it the entire record consisting both of the Petitioners' testimony and the Respondent's testimony. At the threshold of the opinion rendered by Judge Cameron the great variance between the record on the first and second appeals was clearly highlighted.

> "In this case the testimony of appellees was somewhat different from what it had been in the first trial, all of the members of the train crew testified, both on direct and cross-examination, showing full performance of the duties laid upon them by law; the engineer amplified the testimony he had given on *ex parte* examination by appellees' attorney; and,

in addition, evidence was admitted without objection of experiments conducted by engineer Mobley and others which demonstrated that it was physically impossible for him to see appellees' car at a sufficient distance from the point of collision to warrant the finding that it was reasonably probable that the engineer could have done anything to prevent the accident. This experimentation and the measurements developed by it furnished by far the most important additional evidence and will be discussed fully below."

But notwithstanding this difference between the record on the two appeals, petitioners say that the Court of Appeals in the second hearing should have been completely bound by the "law of this case as established in Judge Rives' opinion". They cite as authority for this contention *Thompson vs. Maxwell Land Grant and R. Co.*, 168 U. S. 451, 42 L.Ed 539. A more recent discussion of this rule is found in the very able opinion by Mr. Justice Holmes rendered in the case of *Messinger vs. Anderson*, (1912) 225 U.S. 436, 56 L.Ed. 1152, as follows:

> "In the absence of statute the phrase, 'law of the case' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. King v. West Virginia, 216 U. S. 92, 100, 54 L.Ed. 396, 401, 30 Sup. Ct. Rep. 225; Remington v. Central P. R. Co., 198 U. S. 95, 99, 100, 49 L.Ed. 959, 963, 25, Sup. Ct. Rep. 577; Great Western Teleg. Co. vs. Burnham, 162 U. S. 339, 343, 40 L.Ed. 991, 993, 16 Sup. Ct. Rep. 850."

In the *Messinger* case it is of interest to note that the precise question involved was the construction of a will as it affected lands in the State of Ohio. The *Messinger* case went three times to the Court of Appeals. Pending the proceedings in the federal case, another case was tried in the State courts between the same parties concerning other parcels of land in Toledo, depending on the same title in which the Supreme Court of Ohio construed the will differently from the construction that had been placed thereon by the Circuit Court of Appeals. In holding that the construction put upon the will by the Ohio Supreme Court decision should be followed rather than the construction put upon the will by the Circuit Court of Appeals, the Supreme Court made this observation:

> "In our opinion, even apart from the effect of the state judgment as an adjudication, it should have been followed, if for no other reason, *because, at least, as against the decision of the circuit court of appeals, it was right.*" (Italics ours.)

An examination of Shepard's United States Citations fails to reveal that the *Messinger* case has been in any way limited or modified, as related to the law of the case doctrine. We feel that this ruling is especially important in this case in view of the many decisions of the Mississippi Supreme Court upholding the conclusive effect of measurements as against opinion testimony of the type referred to earlier in this brief and also discussed at length by Judge Cameron in his opinion in the Court below.

The other cases decided by this Court and cited by petitioners on page 17 of their petition in support of their contention that the first opinion delivered by Judge

Rives is in effect *res judicata* actually have no application to the issues here involved, and are easily distinguishable from the case at bar.

IV.

The Court of Appeals in the Opinion Reported 235 F.2d 868 was Correct.

We have previously outlined the facts surrounding this accident. They are almost identical with the facts involved in the case of *Spilman vs. Gulf and S. I. R. Co.*, 173 Miss. 725, 163 So. 445. In the *Spilman* case the accident occurred by reason of Spilman running into the ninth car of a string of flat cars which was moving across a highway. The plaintiff sued in that case on two counts, one the failure to give the statutory bell and whistle signals, and second, the common law duty of the railroad to have given some warning upon or at the crossing in addition to the signals required by statute. In disposing of these contentions the Mississippi Supreme Court announced the following rule:

> "In law, when anything is said to be sufficient, it means that nothing else is required. Since, therefore, the entire crossing was occupied by the railroad cars and had been for a sufficient length of time for a person to see them and to stop before colliding therewith, the said presence of the cars was all the warning thereof that was required, and thereupon the statutory warning by bell and whistle became relegated to the position of actual and legal remoteness, with the result that the failure to give the statutory signals became the remote, and not the proximate, cause, and that the negligence of the plaintiff was the sole proximate cause of the collision,

as was held by the learned trial judge. Any other conclusion would lead to the result that, to avoid the charge of concurrent negligence, the whistle would have to be sounded or the bell kept ringing continuously all the while that any part of a train is upon the crossing, regardless of the length of time thereof. A freight train a half a mile long or more would have to give the signals continuously until the last car had passed over the crossing, which would require a bell and whistle of such construction as to be heard a half a mile or more, whereas the statute requires, as to this, only three hundred yards.

"As to the second count, averring that it was the duty of the railroad to have given some warning upon or at the crossing in addition to the signals required by statute, we add only that, as held in Gulf, M. & N. Railroad Co. v. Holifield, supra, no such additional warnings are required, in the absence of some peculiar environment, and so all courts hold. And, as explained in So. Ry. Co. v. Lambert, supra, and similar cases, the peculiar environment which is referred to means some peculiar condition of hazard which reasonable prudence should have reasonably foreseen would likely lead to a collision, notwithstanding ordinary care on the part of the driver of the motor car. But the conditions of peculiar hazard relied on here by appellant are no more persuasive than those urged in the Holifield case, wherein relief was denied. The judgment must therefore be affirmed on both counts."

What is there in this record to show that Murray would have heeded the sound of a whistle, if additional blasts had been blown? At 300 feet, his lights were on the moving freight train, but he was paying no attention for he

saw nothing—just as he had not seen the Railroad crossing sign 675 feet from the intersection, and just as he did not see the Stop Law Sign. When he did see something at 150 feet away (R. 81) he testified that he merely swerved and without reducing speed drove blindly into the side of the train. It would be purest conjecture to say that additional whistle blasts would have prevented this accident.

We submit that the result would have been the same as that in *New Orleans & N. E. R. Co. v. Burge*, 191 Miss. 303, 2 So.(2d) 825, wherein the Court had this to say:

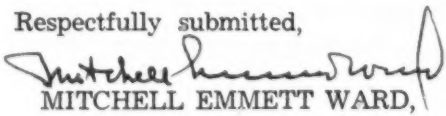
> "* * * To say on the record in the present case that had the required signals been given the injury would not have occurred is to invoke a possibility or conjecture, and it is not within the legitimate province or power of a jury to convert a possibility into something more by the mere force of a verdict. Teche Lines, Inc. v. Bounds, 182 Miss. 638, 649, 179 So. 747. To thus convert, what, on the facts, is no more than a possibility into something more would be to allow an arbitrary exercise of power by an agency employed in government, and in that connection due process must be remembered as a primary constitutional mandate. In view of what is disclosed by this record taking all that the plaintiff says as true together with the undisputed physical facts it is clear as a matter of all reasonable likelihood that appellee would not have heard the bells if two instead of one had been rung. The facts amount practically to a demonstration that he was both deaf and blind to everything except what he himself was doing, his sensibilities were in an evident state of unresponsiveness to all else; and thus the failure to ring the bell—and that was all that appellant was required to do—

disappears as a substantial factor in bringing about the injury; hence appellee cannot recover. . ."

CONCLUSION.

We respectfully submit that for the reasons hereinabove stated and on this record the three points raised by the petitioners must be answered in the negative and the writ should not be granted.

Respectfully submitted,



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